SUPREME COURT OF THE UNITED STATES.

No. 212.

WILLIAM SHEETS, APPELLANT,

vs.

HENRY R. SELDEN, H. WOODRUFF, AND N. E. PAINE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

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1 Pleas of the circuit court of the United States for the district of Indiana, begun, holden, and continued at the United States court-house in the city of Indianapolis, in said district, on the 1st Tuesday in May, A. D. 1866, before the Honorable David Davis, one of the associate justices of the Supreme Court of the United States.

No. 720.

WILLIAM SHEETS
v.
HENRY R. SELDEN, HARMON WOODRUFF AND Nicholas E. Paine. } In chancery.

Bill.

Be it remembered that, at the term aforesaid, at the court aforesaid, on the 6th day of June, A. D. 1866, the following proceedings were had, to wit:

Comes (run) into court the said William Sheets, the complainant in the above entitled suit, by James Morrison, esq., his solicitor and counsel, and files his bill of complaint against said defendants, in the words and figures following, to wit:

To the judges of the circuit court of the United States for the district of Indiana, William Sheets of the city of Indianapolis, in the State of Indiana, and a citizen of the said State, brings this his bill against Henry R. Selden, Harmon Woodruff, and Nicholas E. Paine, citizens of the State of New York, and therefore your orator com-

plains, and says that, heretofore, to wit, on the 23d day of
2 June, A. D. 1860, the defendants brought their action of ejectment in this same court, against your orator, to recover the possession of the following described parcels of land to wit: one tract beginning at the southeast corner of square number fifty (50,) on the plat of the city of Indianapolis, in the district aforesaid; thence north with the eastern boundry of said square, one hundred and twenty feet, to about the out the of toe Berne bank of the Cross-cut canal to the basin; thence west, on a line parallel with the east and west streets of said city, one hundred and ninety feet to the east line of the alley running north and south through said square; thence south, with said alley to the north side of market street; thence east, to the place of beginning, containing half an acre, more or less. The other tract situated in the said city of Indianapolis and district aforesaid, to wit: a strip of land forty feet wide, bounded on the north by the top-water line of the northern line of the Lower mill basin; on the south by a line parallel and forty feet south of said northern boundry; on the west by the top-water line of the lower basin of said Central canal in Indianapolis, and on the east by the top-water line of the upper basin of said canal.

That your orator appeared to the action and pleaded not guilty, and that at the time of this honorable court begun and holden
3 at Indianapolis, in said district, and the , A. D. 1862,

before the Honorable Samuel H. Treat, a judge of the district court of the United States, the cause came on to be heard, and was tried by a jury, and who, having heard the evidence and the charge of the court, returned into the said court the following verdict: "We the jury find the defendant guilty, for and by reason of the forfeiture of the demises mentioned in the bill of particulars, for the non-payment of rents, reserved in and by said demises, respectively mentioned in said bill of particulars, and we assess the plaintiff damages at one cent." Whereupon, it was there and then considered by the court, that the plaintiff should recover of the defendant his time in the declaration mentioned, and his damages to the sum of one cent, so by the jury assessed as aforesaid, together with his costs and charges therein laid out and expended; which judgment remains in full force, as will appear by the record and proceedings in said suit remaining in this same court, to which reference is herein had.

And your orator further says that, at the time of the commencement of the said action of ejectment, the defendant was in the actual possession and enjoyment of the piece, parcel, and tract of land first herein before described, and the water power
1st lease. hereinafter mentioned, under and in virtue of a lease from the said State of Indiana to your orator and one Daniel Yandes,
4 bearing date the 12th day of February, A. D. 1839, whereby it was, amongst other things, agreed and witnessed, that in consideration of the rents reserved and the covenants of the lessees therein contained, the said State agreed to sell and lease to said lessees, for the time of thirty years, from and after the first day of January, A. D. 1839, subject to the restrictions, limitations, and conditions contained in said lease, the use and occupation of so much of the surplus water not required for the purposes of navigation of the "Central canal" at the lock, at the town of Indianapolis, as would be sufficient, when properly applied on a "pitch back" or "high breast" wheel of eleven feet diamater, with the proper gearing, approved by the acting commissioner or engineer, having charge of that portion of the canal, to propel not less than three nor more than four run of four and a half feet mill stones, to be applied to the manufacture of paper, and it was stipulated that the said lessees, for and in consideration of the right to the use and occupation of said water, should pay to the State a yearly rent at the rate of one hundred and fifty dollars for each power used by said lessees; that is to say, for each portion or quantity of water sufficient to propel a run of 4½ feet mill stones, with the necessary apparatus
5 for flouring wheat with the same fall, or a similar wheel to be determined by the engineer aforesaid. Each run of stones being supposed to grind, on an average, five bushels of wheat per hour; and it was provided in and by the said lease, that the lessees should not be deprived of the use of the water by an act of the State or its agents, or by the inadequacy of the supply of water for more than one month, in the aggregate, in any one year; and that, if for the purposes of repairing the canal, preventing breaches, or making

improvements to the canal, or the works connected therewith, or the inadequacy of the supply of water, the lessees should be either partially or wholly deprived of the use of any portion of the water power leased, so as to prevent the operation of any of the hydraulic works usually propelled by the water power leased, such deduction should be made from the rent accruing on such portions of the water power, as the lessees should be prevented from using, as would bear the same proportion to the yearly rent thereof, as the time, during which the lessees might have been deprived of its use, bears to eleven months. The rent to commence on the 1st day of November, 1839, and to be paid semi-annually thereafter, on the first day of May and November, in each and every year, during the continuance of the lease, to such agent of the State as might be authorized
6 by law to receive the same; and it was further stipulated in and by the said lease, that if at any time, any enstallment, which should become due for rent, should remain unpaid for one month from the time it should become due, or if the lessees should, in any respect violate or fail to comply with any of the stipulations contained in said agreement, then and in that case, all the rights and privileges secured to the lessees by said agreement should cease and determine, and any authorized agent of the State or lessee, under said State, should have power to enter upon, and take possession of, and resume all the rights and privileges thereby granted to the said lessees; and that the said lessees should moreover be liable to pay for all damages consequent upon such violation of said agreement; and it was further stipulated in and by the said lease, that the said State, in consideration of the rents and agreements therein specified, leased to the said lessees upon the same conditions, and subject to the same limitations and restrictions therein contained for the use of the water power thereby leased for the like time of thirty years, from the 1st day of January, 1839, the particular portion of ground belonging to the State at said point, first herein before described.

And your orator further says, that in pursuance of the said lease, your orator and said Yaudes were put into the possession
7 of said parcel of ground about the 12th day of February, 1839, and at great expense erected thereon a paper mill, as contemplated by the said lease, and procured and furnished all the machinery and apparatus necessary for the manufacture of paper; and that afterwards, to wit, on the 10th day of October, A. D. 1840, the said Daniel Yaudes, with the consent and approval, in writing, endorsed on said lease of Noah Noble, the duly authorized agent of said State, assigned and transferred to Benjamin J. Blythe and James M. Ray all his right and interest in the said lease; and that afterwards, by like assignments from said Ray and the representatives of said Blythe, your orator became and continued to be the lawful assignee and owner of the interest in said lease, which was by the said lease originally vested in said Yaudes, and in the full and exclusive possession of all that is covered and granted by said lease in his own proper right, except in so far as his said right may be effected by the judgment in the said action of ejectment.

And your orator further says, that the defendants predicated their title and right to recover in said action of ejectment solely upon sales and conveyances to them, or some one or more of them, by parties who claimed and derived their right to the premises
8 in controversy in said action from and under the said State of Indiana, the said State having sold all her right, title, and interest in the northern division of the canal, together with the water power aforesaid, and the rents that might afterwards accrue under the said lease, and all other similar leases to persons under whom the defendants derive their title; and that the defendants claiming to be thus entitled, as landlords, to the rights and benefits of the agreements and stipulations contained in said lease, and in another lease to your orator in favor of the State, they did, on the first day of May, and the 1st day of June, 1860, by an agent, demand on the premises the payment of the sum of $220 96, as and for rents of said premises first described for six months, between the first day of November preceding, and the 1st day of May, 1860, and did, at the same time, demand $110 48 for six months rent, under the other lease for the same period; and said rents being not then paid, they did, on the 23d day of June, 1860, bring their said action of ejectment to recover the possession of said several premises, claiming that, by reason of such non-payment, your orator had forfeited his tenancy and term under each of said leases; and the defendants having, so as aforesaid, recovered in said action the judgment
9 rendered therein, was afterwards removed by your orator to the Supreme Court of the United States, by writ of error, by which tribunal the said judgement was, in all things, affirmed; and a mandate has thereupon issued from said Supreme Court to this honorable court, commanding further proceedings in this court, in accordance with the judgment of that court, as your orator is informed, though he has not been able to find such mandate, by his inquiries, at the clerk's office; and that he is ready and willing to pay all costs due in either court in the said action of ejectment, if he can ascertain the amount; but he has not been able to ascertain the costs in the Supreme Court as yet; and your orator is informed and believes that, unless restrained by this honorable court, the defendants will immediately sue out the writ of habere facias possessionem upon said judgement, and your orator will be evicted from said premises first described to his great and irreparable injury, his said paper mill, at said lock, fixtures, and machinery, being of the value of, at least, $8,000 00.

And your orator further says, that he has paid all the costs and charges of the said action in this court, and that he is ready and willing to pay to the defendants all rents to which they are justly and equitably entitled under the provisions of the said leases, and
10 the interest thereon, if any is due, if they will accept the same in lieu of their said judgment, waive the said supposed forfeiture, and satisfy the judgment at law, or consent to an order of this court perpetually restraining them from proceeding any further upon the judgment.

And your orator further says, that desiring to come to a fair accounting with the defendants aforesaid, concerning the rents payable to them under said leases respectively, he has endeavored to ascertain the exact amount which the defendants claim to be due them for rents; and to that end your orator, on the 22d day of April last, did. by his attorney and counsel, James Morrison, address to A. G. Porter, esq'r., one of the attorneys-at law for the defendants in the said suit at law, a written request, respectfully asking to be informed: 1st, when did the right of the defendants accrue, and from what date did they claim; 2d, for how many "powers" did they claim; and 3d, what credits did they allow for inadequate supplies (meaning of water) each year? To which inquiries your orator, or his counsel, has received, as yet, no answer.

And your orator further says, he has not been able to ascertain the precise time when the rights of the defendants accrued as landlords, nor what they do claim as due them as such, though he believes, and therefore charges, that neither of the defendants had any
11 right, or title, or claim to any rents until or about the 2d day of October, 1857, which, your orator is informed, is the date of the conveyance of the canal and its appurtenances from one Jeremiah Jackson to the defendant Paine, and which conveyance was prior to any right or title by the other defendants.

And your orator further says, that prior to the conveyance to said Paine, and as far back as the period when the State was still the landlord, and down through successive proprietorships and agencies, your orator's mill was often, and for a much longer period than one month in the year, through all the years preceding the 2d day of October, 1857, inadequately supplied with water, although no water was ever withdrawn or reserved by the State for purposes of navigation; nor was the canal ever used for purposes of navigation, or finished, as contemplated by the provisions of the act to provide for a general system of internal improvements.

And your orator further says, there was generally and always, as he verily believes, water in the canal, or that could have been introduced into the canal by the feeder, 8 miles north of Indianopolis, by the use of proper and reasonable efforts, adequate and sufficient to supply your orator's said mill and all the other mills and works dependent on the canal for their supply; and your orator
12 charges that this was the case especially since the said second day of October, 1857, and during all the succeeding time until the present; that over and beyond the one month in each year provided in the lease, for which time there need to be no supply furnished, your orator has been deprived of the required supply according to the lease, as follows: 7

For the time from the 2d day of October, 1857, till 1st of January, 1858, he was deprived of a supply 15 days, for which he is entitled to an abatement on the rent for that period, of..... $31 00

And from 1st January, 1858, till first January, 1859, he was deprived 199 days..... 437 00

And from 1st January, 1859, till 1st January, 1860, he was deprived 173 days..... 379 00

And from 1st January, 1860, till 1st January, 1861, he was deprived 198 days	433 00
And from 1st January, 1861, to 1st January, 1862, he was deprived 132 days	289 00
And from 1st January, 1862, till 1st January, 1863, he was deprived 143 days	313 00
And from 1st January, 1863, till 1st January, 1864, he was deprived 138 days	302 00
And from 1st Junuary, 1864, till 1st January, 1865, he was deprived 192 days	420 00
And from 1st January, 1865, till 1st May, 1866, he was deprived 21 days	45 00
	$2,649 00

13 Therefore, your orator is entitled to an abatement of said sum from the rents due the defendants, under said first mentioned lease, and he offers to set off said sum against so much rents.

And your orator further says, that the defendants are equitably and justly indebted to your orator in the sum of six hundred and seventy-nine dollars and forty-nine cents for moneys paid, laid out, and expended by him to and for the use of the defendants, in and about repairing breaches and removing obstructions in the said canal, from which the water was, and is supplied to the said mill of your orator, in the year 1858, and in the further sum of two hundred and fourteen dollars for the interest on said sum, making together $893 49; that the expenditures mentioned were indispensable and absolutely necessary to the running of his said mill, which, together with the other mills dependent upon said canal for a supply of water, had been erected at the said point, under leases of water power, similar to that of your orator, and entitled to be furnished with water by the defendants as the purchasers of the State's interest; that there was no person found representing the landlord, whoever he was, to have the work done, and therefore your orator and the other lessees were forced to either have the work done themselves, or have their

14 mills to stop for an uncertain period, to their great and irreparable damage and injury. Wherefore, your orator says that he is entitled in equity and good conscience to an abatement from the amount of rent due the defendants, under said lease, of the said sum of $893 49, and he offers to set off said sum against so much of said rents.

And your orator further says, that the said inadequate supply of water was owing to the culpable negligence and gross carelessness of the defendants and their agents, in failing to repair breaches in the canal banks, occurring from time to time, and in failing to remove obstructions to the flow of water in the canal, created by the growth of grass in the bottom and sides of the canal, and by abrasions of the banks, and by caving in of the banks, and other causes; all of which might have been overcome and removed by proper exertion and vigilance, within a space of time less than a month in the aggregate in any one year; and that by reason of such culpable negligence and

gross carelessness of the defendants, your orator was deprived of an adequate supply of water at his said mill, as hereinbefore set forth, from the 2d day of Oct., 1857, till the first day of May, 1865, over and beyond the one month allowed by the lease, and that by reason of such deprivation your orator necessarily and unavoidably
15 lost in wages paid hands employed by him, in and about said mill, whilst the mill was partially, irregularly, and spasmodically supplied with water during said period, $5,010 55, the average interest on which sum is $901 90; and that the injury sustained by his machinery attached to the mill, by reason of its standing more than half the time for want of an adequate supply of water, was at the least $200 a year more than if it had been running regularly, as contemplated in the lease, 7 years, at $200, is $1,400; that he claims that he is entitled to interest on one half of his said mill and machinery, being for the proportion of time lost for want of the required supply; the mill and the machinery being then of the value of $10,000, the interest for 7 years is $2,275—making a sum total of $9,587 45.

And your orator says, that in equity and good conscience he is entitled to recover from the defendants the said last mentioned sum, after first deducting the balance due for rents, according to said lease; and your orator offers to set off so much of said sum as will satisfy the said rents in full. And your orator prays that the defendants be required to account for and pay to your orator the damages by him so as aforesaid sustained.

And your orator further says, that although he had his said
16 mill erected and in proper running order, and had the proper machinery affixed and attached, and the proper gearing for running the mill, and the proper wheel, as prescribed in the lease, in the year A. D. 1839, and proceeded to manufacture paper, yet the quantity of water flowing to said mill, to be used in propelling the machinery, was never accurately guaged by any engineer, or other authorized agent of the State; nor was the quantity of water deemed or found necessary, ever certified by any engineer on the back of the said lease, or by any separate writing; nor has such an endorsement ever been made by any person or party to this day. Whereupon, your orator says that the exact quantity or amount of water intended to be leased has never yet been fixed or determined according to the terms of the lease. Your orator admits, however, and alleges, that it was understood that he would be and was entitled to a supply equal to four "powers," and he has paid rents according to that understanding; and he therefore claims that he was and is entitled to that much.

And your orator further says, that there was never a weir to control and regulate the flow of water to the mill, constructed and placed as contemplated in the lease, because the plan for such a structure was never furnished by the commissioners or engineer.

17 And your orator further says, that there never was furnished to him water at a level high enough to propel when properly applied to a "pitch back" or "high breast" wheel of eleven feet diameter, with the proper gearing, to propel four run of four

and a half feet mill stones, when applied to the manufacture of paper; that the implement was made under the eye and superintendence of the proper engineer and acting commissioner, and it failed: and your orator was, therefore, forced to adopt and substitute other wheels of less diameter, from time to time, and of different model and construction, and to change the wheels several times hitherto, thereby subjecting him to large expenses, amounting in all to——

And your orator further says, that the State granted leases of other portions of the said surplus water to other parties upon terms similar to those specified in the lease to said Yaudes and your orator, which grants were, however, subsequent to the date of the lease under which your orator claims, as your orator is informed and believes, and therefore your orator avers that it was and is the right of your orator to be supplied with the quantity of water granted by the said lease before and in preference to these other tenants, whenever there was or is not enough for all, whenever there is not more than sufficient to supply your orator's mill. But your orator
18 alleges that his rights in that regard have been entirely disregarded from the beginning, both by the State and her agents, and by those who have succeeded to the rights of the State including the defendants, that the practice of these lessees and tenants has been, and continues to be, to have their own mills supplied by drawing off all the water that could or can be drawn from your orator's mill, whenever there is a scant supply in the canal, and that the position of the other mills is such in reference to the level at which all the water is taken from the canal, that those other mills can be supplied and run when the mill of your orator would have to stand, or have but a partial supply, and that this has been done often to the great injury of your orator. And your orator charges that the practice referred to, has not been restrained by the defendants, so far as your orator is informed and believes, but that on the contrary, your orator believes the practice to have been approved by the defendants or their agents, of whom Gay, said to be their general agent, having within the last two years, in partnership with William Braden, erected a paper mill on the basin below your orator's mill at the lock, and has caused the arm of the canal opposite your orator's forebay or head race to be deepened the more effectually to draw the water from your orator's mill whenever there is an inadequate
19 supply in the canal. And the defendants have neglected to repair the canal below your orator's mill, causing your orator, several times, considerable injury.

And your orator further says, that he was put unto the actual possession of the piece, parcel, or lot of ground described secondly above, and the water-power hereafter mentioned, about the day
2 lease. of 18 , under and in virtue of a lease from the said State of Indiana to your orator, bearing date the 1st day of January, 1840, whereby it was, among other things, agreed and witnessed, that in consideration of the rents reserved and the covenants of your orator thereinafter contained, the said State agreed to sell and lease to your orator, for the term of thirty years, from the 1st day of Jan-

uary, 1840, subject to the restrictions, limitations, and conditions therein contained, the use and occupation of so much of the surplus water of said canal, not required for the purposes of navigation, at the north end of the upper basin in Indianapolis, adjoining and immediately north of the upper tumble, as would be sufficient, when properly applied on an "over shot" wheel of sixteen feet diameter with the proper gearing, to be approved by the acting commissioner and engineer having charge of that portion of the canal, to propel two run of four and a half feet mill stones, to be applied to
20 the manufacture of "wrapping paper." And it was stipulated that your orator should pay to the State, in consideration of the right to the use and occupation of such water, a yearly rent of one hundred and fifty dollars for each power, it being understood that a "power" means a quantity of water which would be sufficient, if applied to the above-prescribed wheel, to propel a run of four and a half mill stones, grinding at an average rate of five bushels of wheat per hour, providing your orator should not be deprived of the use of the water by any act of the State or its agents, or by the inadequacy of the supply of water for more than one month in the aggregate in any one year, and if for the purpose of repairing the canal preventing breaches, removing bars, or other obstructions, or making any improvements to the canal or the works connected therewith, or in consequence of breaches or an inadequate supply of water, your orator should be either partially or wholly deprived of the use of any portion of the water-power thereby leased, so as to prevent the operation of any of the hydraulic works usually propelled by such power, such deduction should be made from the rent accruing on such portions of the water-power, as your orator should be so prevented from using as would bear the same proportion to the yearly rent thereof, as the time during which your
21 orator had been deprived of its use bears to eleven months. The rent to commence on the 1st day of July, 1840, and to be paid semi-annually thereafter, on the 1st day of May and November in every year during the continuance of the lease, to such agent of the State as might by law be authorized to receive the same. And it was further stipulated in and by said last-mentioned lease, that if at any time, any instalments which might become due for rent should remain unpaid for one month from the time it should become due, or if the lessee should in any respect violate or fail to comply with any of the stipulations contained in said lease, that then and in that case, all the rights and privileges secured to the lessee by said lease should cease and determine, and that any authorized agent of the State or lessee under said State should have power to enter upon and take possession of the premises and resume all the rights and privileges thereby granted to the lessee, and that said lessee should moreover be liable to pay for all damages consequent upon such violation. And it was thereby further stipulated that the said State, in consideration of the rents and agreement before specified, agreed to lease to your orator, upon the same conditions and subject to the same limitations
22 and restrictions, such part of the ground belonging to the

State at the point above-named, as in the opinion of the engineer having charge of that portion of the canal might be necessary to the use of the water-power thereby leased for the like term of thirty years, from the first day of January, 1840, the particular portion of ground to be staked off and designated by said engineer, to wit: The piece, parcel, or lot of ground secondly herein above-described.

And your orator further says, that having gone into the possession of the said last-mentioned parcel of ground under the lease last-mentioned, he proceeded on or about the day of , 1840, to erect, and did erect thereon, at the point designated, a paper mill as contemplated by the parties to said lease at an expense of about $4,000, and put the same in operation, furnishing all the necessary apparatus for the manufacture of wrapping paper, the gearing being approved by the acting commisssioner and engineer having charge of that portion of the canal; that your orator manufactured wrapping paper at said last-mentioned mill as the supply of water would enable him, until about the year 1850, when it was wholly and finally abandoned by your orator,
23 and has never since been used by him or any one: That the supply for several years preceding such abandonment was so irregular and scant, that to afford a reasonable supply for his other and principal mill at the lock, hereinbefore mentioned, and the other mills on the same level, it was often necessary to stop the running of the mill at that point, and that such occasions recurred so frequently, that they destroyed the value of the wrapping paper mill, rendering it worthless to him, and a continued expense, without any profit.

Your orator further says, that the State, previous to the sale of the canal, and the other parties who became the owners of the canal, or the claimants under the State, immediately or remotely, were materially and essentially benefitted by the abandonment and discontinuance of your orator's mill at the tumble, because the water that would have escaped from that mill, if running, would have been so much withdrawn from the other mills and machinery at the lock and below on the basin; and the continued running of the mill at the tumble would have often stopped the other mills wholly or partially, and so either absolved the tenants from the payments of any rents for the time being, or materially reduced the amount.

Your orator further says, that often the deprivation or the inadequacy of the supply of water at all of the mills, including those of
24 your orator at the points mentioned, was owing wholly to the culpable neglect of the parties whose duty it was to keep the canal in proper repair, and to remove obstructions to the flow of water in the canal; and that for these reasons, and for those before stated, your orator was compelled to wholly abandon his mill at the tumble, which abandonment was final in the year 1850, and long before the defendants had any interest in said canal, or in said leases. But your orator charges that the defendants are also estopped from claiming any rents under that lease, because he says that the defendants, by their agents, finding the said mill abandoned

when they purchased the canal and its incidents, treated such abandonment as being a reverter; and accordingly the defendant Paine' by his agent, removed, tore away, and destroyed the flume or trunk that had been constructed by your orator, and maintained by him at that point to convey the water from the basin to the wheel which propelled the machinery of the mill, thereby rendering the said mill wholly useless in all coming time, and destroyed the mill site, unless your orator had expended two or three hundred dollars in restoring the flume, which, under the circumstances, he had no encouragement to do; and so your orator says, that the defendants did never
25 supply water to said paper mill at the tumble, and that no part of the rent stipulated for at said point is in arrear.

And your orator further says, that heretofore, to wit, on the 13th day of May, A. D. 1862, and when the said action of ejectment was yet pending on the common law side of this same court, your orator offered and tendered to David McDonald, esq., the sum of four hundred dollars, as in full for the said $110 48 claimed to be due the defendants from your orator, under the lease last mentioned, and described under the bill of particulars filed by the defendants in the said suits as being for six months rent, between the 1st day of November, 1859, and the 1st day of May, 1860, payable on the day last mentioned, and the interest thereon from the date of the demand of said rent; and as in full, also, of the said $220 96 claimed by the defendants to be due, as aforesaid, under the said lease from the State to said Yaudes and your orator, also described in the said bill of particulars as for rent for the same period, and the interest thereon from the date of said demand, and as in full, also, of the costs of the said action of ejectment to that date, as computed by the clerk of this court, amounting, at that time, to $14 40 over and above
26 what costs your orator had previously paid, which tender was then and there declined by the said McDonald, who was then and there one of the attorneys-at-law of the said defendants in said action of ejectment, the said offer being in writing, signed by your orator, and the rejection of it being, also, in writing, signed by the said McDonald.

And your orator further says, that the said sum so tendered was sufficient to cover all the rents that had been so demanded, and the interest on said rents up to the time of the tender, and all the costs in the said action of ejectment to that time, which had not been previously paid by your orator.

And your orator further says, that he now brings into court for the defendants, if they will accept the same, the said $400 00, as and for the objects for which the said sum was originally tendered, as hereinbefore mentioned, and waive the forfeiture, for which the verdict and judgment were rendered in the said ejectment suit. And your orator is ready and willing to pay to the defendants any and all rents which, upon a fair accounting, may be found to be due them, under and in virtue of the said lease, from the State to said Yaudes and your orator. But your orator charges, that in equity and
27 good conscience he owes the defendants nothing, if he is

allowed an abatement from the rents of the time for which he was so deprived of an adequate supply of water, as hereinbefore stated, and is allowed, also, for the damages by him otherwise sustained, as hereinbefore set forth, all which he claims to be entitled to in equity and good conscience.

And he also claims that he is entitled, beyond such relief, to a judgment and decree for the excess of what may be found to be due him upon such accounting.

And your orator says, that he is not willing to do anything more than he has already done and suffered to set aside the forfeiture of the lease from the State to your orator that if the forfeiture were set aside, he could derive no benefit. That no adequate supply of water can or could be furnished at the tumble, as contemplated in the lease without either wholly destroying or greatly impairing the supply absolutely needed at the mill or the lock, and those on the basin below.

And your orator further says, that the defendants have uniformly decided the right to your orator to any abatement of rents, except to a trifling amount in each year.

And that by their bill of particulars, filed in the said suit in ejectment, the defendants claimed that by virtue of said leases, large sums of money became due to the State for rents of said premises,
28 to wit, under the lease first mentioned: that the sum of $666 66 fell due on the 1st day of November and May every year from the first day of August, 1846, till the 30th day of June, 1851, and on the lease last aforesaid the sum of $333 33 fell due on the same days for the same period of time; and that the said several sums had never been paid to the State. And that on the 2d day of October, 1857, the premises came to the defendants by intermediate conveyance from the State, and that your orator had never paid any rent till the time of the filing of said bill of particulars, which was the 3d day of June, 1860, from which several averments your orator is induced to believe that the defendants will claim the rents thus averred to be due and unpaid; but your orator respectfully claims that he is not responsible in law or equity to the defendants, to do more than pay them whatever amounts of rents may be due and owing fairly, and equitably, computing the time of the commencement, the rights of the defendants from the time that they, or some one of them, received a conveyance of the State's interest in the premises, which time, as shown by the said bill of particulars, was the 2d day of October, A. D. 1857. Your orator is willing and offers to submit to such conditions and
29 terms as this honorable court shall see fit to impose in order that there shall be secured to the defendants any and all rents that may, upon a fair accounting, be found due them under the lease just mentioned, and which was granted to said Yaudes and your orator, and to give sufficient security to abide by and perform any order in the premises. Your orator denies that by the verdict of the jury, or the judgment thereon, he is at all estopped or concluded from denying that water was supplied according to the leases; the admission of your orator on that subject having been made by your orator for the purpose of that trial only. To the end, therefore, that the said

defendants may answer the several matters hereinbefore charged, upon their oaths, severally, and as fully and particularly, as if the said matters were here again repeated, and they thereto particularly interrogated. May it please your honor to grant to your orator a writ of subpœna requiring the defendants to appear in this court and answer the said matters, and that your honors will, on the final hearing, enjoin the said defendants from enforcing against your orator the said judgment at law, and order the same to be entered satisfied, and that the forfeiture of the lease of the State to said Yaudes be set aside, and that your orator shall hold for the remainder of his time, and according to the times and conditions of the said lease.

30 And your orator shall have and recover from the defendants the damages by him sustained for the causes hereinbefore set forth, and that in the meantime, and until such final hearing, the proceedings and judgment in the said action of ejectment be stayed, and that your orator have other proper relief.

J. MORRISON, *Attorney for Complainant.*

William Sheets, the complainant in the above-mentioned suit, being duly sworn on his oath, says that the matters stated in the foregoing bill of complaint, so far as they are stated from his own knowledge, are true in substance and fact, and that so far as they are stated from information, he believes them to be true, and further saith not.

WM. SHEETS.

Sworn to and subscribed this 6th of June, 1865.

J. D. HOWLAND, *Clk.*

And the said complainant, by his counsel, moves the court for an injunction, and restraining order, according to the prayer of the bill, enjoining and restraining the defendants from sueing out of this court, or from the clerk's office thereof any writ of habere facias possessionem, or other writ of execution under or in virtue of the proceedings and judgment of this court in the above ejectment lately tried in said court, wherein the said Selden, Woodruff, and

31 Paine were plaintiffs, and the said Sheets was defendant, and which judgment was affirmed by the Supreme Court of the United States.

Order of injunction.

And it appearing to the satisfaction of the court, that reasonable notice of the time and place of the application for such injunction had been given to Thomas A. Hendricks, esquire, and Mess. Porter and Fishback, the attorneys at law of the defendants in this suit, and the plaintiffs in the said action of ejectment, and that Mr. Hendricks appeared, and the premises being seen, it is ordered by the court now here, as follows, to wit: that until the ensuing term of this court, and until the further order of this court the said defendants, and each of them, and their attorneys, solicitors, and agents, be and

they are hereby enjoined and restrained from taking out the writ of possession, or any other writ of exemption, or other proceedings, under or in virtue of the judgment in the said action of ejectment in this court, or in the Supreme Court of the United States, so far as regards the possession of the complainant in this suit of the mill and water power and parcel of ground situated near the lock of the central canal in the city of Indianapolis, and held and claimed by the complainant under the lease granted to the State by Daniel Yaudes
32 and the complaint. The said complainant filed his bond to the said defendants, in the penalty of five thousand dollars, with Robert Browning, his surety, approved by the court, conditioned to prosecute his said suit with effect, and to pay to the defendants all damages, which they, or either of them, shall sustain by reason of the said injunction, and restraining order; and the complainant also tendered in court, for the said defendants, if they would receive the same, the said $400 heretofore tendered them by him before the last trial of the said ejectment in this court.

And it is ordered, by consent of the parties, that defendants shall now enter an appearance in this suit, which is now done, but that no rule shall be taken against them for answer to operate sooner than the second week of the next ensuing term of this court. And the said Thomas A. Hendricks, esquire, the attorney and solicitor for the defendants, here in open court refused to receive the said tender of $400 so made now in this court, and this cause is continued.

And afterwards, to wit. in the court aforesaid at the November term, 1865, on the 17th day of November, the following further proceedings were had:

33 Come the parties by their respective solicitors, and by their agreement this cause is continued with leave to answer at the next term. And afterwards, to wit: at the court aforesaid, at the May term thereof, 1866, on the 14th day of May, the following further proceedings were had: Come now the parties by their solicitors, and the defendants now withdraw their motion to strike out certain parts of the complainant's bill heretofore filed, and now file their demurrer to said bill, and the same is set down for hearing. Here follows the demurrer.

Demurrer.

These defendants, by protestation, not confessing all or any of the matters and things in said complainant's bill contained, to be true in such manner and form as the same are therein set forth and alleged, do demur to said bill and for cause of demurrer, say that complainant's said bill of complaint contains not any matter of equity whereon this court can ground any decree or give the complainant any relief or assistance as against them. these defendants.

HENDRICKS and HORD and PORTER,
HARRISON and FISHBACK,
Solicitors for defendants.

I certify, in my opinion, the above demurrer is well founded in point of law.

A. G. PORTER, *One of defendant's solicitors.*

34 In the circuit court of the United States, for the district of Indiana.

I, , one of the defendants in the above-named suit, solemnly swear that the foregoing demurrer is not interposed for delay, so help me God.

Subscribed and sworn to this 14th day of May, 1866.

Decree sustaining demurrer.

And afterwards, to wit: at the court aforesaid, at the term aforesaid, on the 17th day of May, 1866, the following further proceedings were had herein, to wit: This day come the parties, and the court having sufficiently considered the law arising on the demurrer to the bill, is of the opinion that the demurrer be sustained, and it is so ordered. And it is further ordered that the complainant have leave to amend his bill, as he may be advised by counsel, the court being of opinion in this case that the complainant is not entitled to be relieved from the consequences of his forfeiture unless he amends his bill, so as to tender all the rent, with the interest that has accrued on both leases since the suit in ejectment was begun, and brings the money into court. And it appearing that there was due from rent on the lease to Yaudes and Sheets, from 1st May, 1860, to 1st
35 May, 1866, $, including interest, $4,494 50. And that there was also due on the lease to William Sheets, during said period, with interest, the sum of $2,247 25. It is now, therefore, ordered that the injunction in this case be dissolved unless the complainant amends his bill tendering said sum of money, and brings the said sums into court by the first day of June next, and day is given the parties.

Decree dismissing bill.

And afterwards, to wit: at the court aforesaid, at the term aforesaid, on the 26th day of May, A. D. 1866, the following further proceedings were had herein, to wit: Comes now the complainant, William Sheets, by James Morrison, esquire, his solicitor, and excepting to the opinion and order of the court sustaining the demurrer of the defendants to the bill of complaint of the complainant, he informs the court that he declines to amend his said bill of complaint, so as to tender all the rent, with interest, that has accrued on both leases since the suit in ejectment was begun, and bring the same into court, to wit: the sum of $4,494 50, as computed and found by the court to be due for rent on the lease to Yaudes and Sheets, from 1st May, 1860, to 1st May, 1866, including interest; and the sum of $2,247 25, as computed and found by the court to be due for rent, including interest, on the lease of William Sheets during the said
36 periods. Wherefore, it is ordered and adjudged by the court that the said bill of complaint be, and the same is dismissed by the court for want of equity, and the injunction is dissolved at the

costs of the complainant. It is therefore adjudged and decreed by the court that the defendants as to said suit go hence without day, and recover of the complainant their costs and charges by them about their said defense in this behalf sustained, taxed at $, to all which judgment and decree the complainant excepts.

Appeal.

And thereupon, the complainant prays an appeal from said judgment and decree to the Supreme Court of the United States, in pursuance of the statutes in such case made and provided, and the rules of court on the subject; which prayer is granted on the conditions that the complainant shall, within ten days from the date of this decree and judgment, file in this court a good and sufficient bond in the penalty of ten thousand dollars, with Robert Browning as his surety, conditioned that the complainant shall prosecute his appeal to effect, and answer all damages and costs if he shall fail to make good his plea. And the complainant thereupon comes into court and presents a bond,
with the said Robert Browning as his surety, in the penalty of
37 ten thousand dollars, payable to the said defendants, conditioned so as aforesaid, which bond being inspected, is approved by the court and filed. And it is accordingly ordered that an appeal from the said judgment and decree be, and the same is hereby, granted the complainant to the Supreme Court, as prayed by him. And that the appeal shall operate as a supersedeas in this cause, and as a stay of execution upon the said judgment in ejectment. Here follows the bond in the words and figures following, to wit:

Bond.

Know all men by these presents, that we, William Sheets and Robert Browning, of the county of Marion, and State of Indiana, are held and firmly bound to Henry R. Selden, Harmon Woodruff, and Nicholas E. Payne, of the State of New York, in the penal sum of ten thousand dollars, for the payment whereof we bind ourselves, our heirs, and executors, and administrators, severally and jointly, by these presents.

Sealed with our seals, dated this 26th day of May, A. D. 1866.

Whereas, the above-bound William Sheets has prayed an appeal to the Supreme Court of the United States, from the judgment and decree of the circuit court of the United States for the 8th circuit and district of Indiana, in a suit in equity, wherein said Sheets was complainant and said Selden, Woodruff, and Paine were defend-
38 ants: Now, therefore, the conditions of the above obligation is such, that if the said Sheets shall prosecute his said appeal to effect, and answer all damages and costs if he fails to make good his plea, then this obligation to be void, else to remain in full force.

[SEAL.] WM. SHEETS.
[SEAL.] R. BROWNING.

39 UNITED STATES OF AMERICA, *District of Indiana, ss:*

I, John D. Howland, clerk of the United States circuit court, in and for the district aforesaid, do hereby certify, that the above and foregoing is a full, true, and complete transcript of the record and proceedings in the above-entitled cause, as fully as the same remain in their office.

In testimony whereof, I do hereunto set my hand, and the seal of said court at Indianapolis, this 3d day of July, 1866.

[SEAL.] J. D. HOWLAND, *Clerk.*

[5-ct. stamp.

40 In the Supreme Court of the United States.

WILLIAM SHEETS, appellant,
vs.
HENRY R. SELDEN, HARMON WOODRUFF, and Nicholas E. Paine, appellees. } On appeal.

Comes into the Supreme Court of the United States, at its December term, A. D. 1866, the said appellant, William Sheets, and says, that in the record and proceedings aforesaid, and in the decree and judgment aforesaid, there is manifest error, in this, to wit: that the said appellant's bill of complaint aforesaid, and the matters therein contained, are sufficient in law and equity for the said appellant to have and maintain his aforesaid suit against the said appellees.

There is also error in this: that by the record aforesaid, it appears by the decree and judgment aforesaid, in form aforesaid given, were given for the said appellees against the said appellant, whereas by the law of the land the said decree and judgment ought to have been given for the said appellant against the said appellees.

There is also error in this: that by the record and proceed-
41 ings aforesaid it appears that said court sustained the demurrer to the bill of the appellant, for want of equity, and thereupon gave final judgment in favor of the appellees, dismissing the said bill, whereas the said demurrer should have been overruled, and the appellees required to answer or plead to the bill.

And the appellant prays that the decree and judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed and held for nothing. and that he may be restored to all things which he has lost by occasion of the said judgment and decree, &c.

J. MORRISON,
Att'y and Solicitor for Appellant.

No 81

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IN THE SUPREME COURT

OF THE

UNITED STATES.

WILLIAM SHEETS,

vs.

HENRY R. SELDEN,
HARMON WOODRUFF, AND
NICHOLAS E. PAYNE.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF AND ARGUMENT FOR APPELLANT.

J. MORRISON,
ATTORNEY FOR APPELLANT.

Indianapolis Daily Journal Print.

IN THE SUPREME COURT

OF THE

UNITED STATES.

WILLIAM SHEETS, APPELLANT,

vs.

HENRY R. SELDEN,
HARMON WOODRUFF, AND
NICHOLAS E. PAYNE.

On appeal from the Circuit Court of the United States for the District of Indiana.

IN CHANCERY.

ABSTRACT.

This suit was brought by the appellant, in the Court below, to injoin the appellees from suing out execution, upon a judgment in ejectment in their favor, against the appellant, rendered in the same Court, in the year 1862; and which judgment was removed to this Court by writ of error; and at the last preceding term, the judgment was affirmed.

The bill of complaint shows, that the ejectment suit was brought to recover the possession of two several parcels of land.

Record, p. 2.

The following verdict was rendered:

"We, the jury, find the defendant guilty, for and by reason of the forfeiture of the demises mentioned in the bill of particulars, for the non-payment of rents reserved in said demises respectively mentioned in the said bill of particulars, and we assess the plaintiffs damages at one cent."

Record, p. 3.

It is averred, that at the time of the commencement of the ejectment suit, the appellant was in the possession of the parcel of land *first described*, and the water power mentioned, under a lease from the State of Indiana, to himself and one Daniel Yandis, bearing date 12th of February, 1839, whereby it was agreed, amongst other things, that in consideration of the rents reserved, and the covenants of the lessees, the State agreed to sell and lease to the lessees, for the term of thirty years from the 1st day of January, 1839, subject to certain restrictions, the use of so much of the surplus water not required for the purposes of navigation, at the Lock of the Central Canal, at the town of Indianapolis, Indiana, as would be sufficient, when properly applied on a "Pitch Back," or "High Breast" wheel of eleven feet diameter, with the proper geering, approved by the acting commissioner or engineer having charge of that portion of the canal, to propel not less than three, nor more than four run of four and a half feet mill-stones, to be applied to the manufacture of paper; and it was stipulated that the lessees, in consideration of the right to such use, should pay the State, a yearly rent, at the rate of one hundred and fifty dollars, for each power used by the lessees—that is to say; for each portion or quantity of water sufficient to propel a run of four and a half feet mill-stones, with the necessary apparatus for flouring wheat, with the same fall, or a similar wheel, to be determined by the engineer aforesaid; each run of stones being supposed to grind, on an average, five bushels of wheat per hour.

Record, p. 3.

The bill further alleges, that it was provided in the said lease, that the lessees should not be deprived of the use of the water, by any act of the State, or its agents, or by the inadequacy of the supply of water, for more than one month, in the aggregate, in any one year; and that if, for the purpose of repairing the canal, preventing breaches, or making improvements to the canal, or the works connected therewith, or the inadequacy of the supply of water, the lessees should be either partially or wholly deprived of

the use of any portion of the water power leased, so as to prevent the operation of any of the hydraulic works usually propelled by the water power leased, such deduction should be made from the rent accruing on such portions of the water proper, as the lessees should be prevented from using, as would bear the same proportion to the yearly rent thereof, as the time during which the lessees might be deprived of its use, bears to eleven months; the rent to commence on the 1st day of November, 1839, and to be paid semi-annually thereafter, on the 1st day of May and November in each and every year during the continuance of the lease, to such agent of the State as might be authorized by law to receive the same; and that if, at any time, any instalment which should become due for rent, should remain unpaid for one month from the time it should become due, or if the lessees should in any respect violate, or fail to comply with any of the stipulations contained in said agreement, then, and in that case, all the rights and privileges secured to the lessees, by said agreement, should cease and determine, and that any authorized agent of the State should have power to enter upon and take possession of, and resume all the rights and privileges thereby granted to the lessees; and that the lessees should moreover be liable to pay for all damages consequent upon such violation of said agreement; and that, in consideration of the rents and agreement therein specified, the said State further leased to the said lessees, upon the same conditions, and subject to the same limitations and restrictions, for the use of the water power thereby leased, for the like term of thirty years from the said 1st day of January, A. D., 1839, the particular portion of ground described in said first mentioned lease:

Record, pages 3 to 6, inclusive.

That the appellant and his co-lessee, Yandes, were put in possession of the particular parcel of land mentioned, about the 12th day of February, 1839, and at great expense erected a Paper Mill thereon, as contemplated in the lease, and procured and furnished all the machinery and apparatus necessary for the manufacture of paper:

That on the 10th day of October, 1840, the co-lessee, with the consent and approval, in writing, indorsed thereon, of the agent of the State, assigned his interest in the lease to two other persons, Blythe and Ray, who, afterwards, in like manner, assigned all their interest to the appellant, whereby he became the sole owner of the lease, and entitled to the full and exclusive possession of all that

was covered by the lease; and that he had continued in such possession ever since:

That the appellees predicated their title and right to recover in the said action of ejectment, solely, under conveyances from parties who claimed, under the said State of Indiana; the State having sold all her right, title, and interest in the northern division of the canal, together with the water power aforesaid, and the rents that might afterwards accrue under the said lease, and all similar leases, to persons under whom the appellees derived title:

Record, p. 7.

That the appellees, claiming to be thus entitled, as landlords, to the rights and benefits of the agreements and stipulations contained in said lease, and in another lease to the appellant, (which will be hereinafter particularly referred to,) they did, on the first day of June, 1860, by an agent, demand, on the premises, the payment of the sum of $220 96, as and for rents of said premises *last described*, for six months, between the first day of November, preceding, and the first day of May, 1860; and at the same time did demand $110 48, for six months rent, *under the other lease*, for the same period; and said rents not being paid, the appellees, on the 23d day of June, 1860, brought their said action of ejectment to recover possession of said several premises, claiming that by reason of such non-payment, the appellant had forfeited his tenantcy and term, under each of said leases:

Record, p. 8.

That the appellees having recovered, in said action, the judgment rendered therein, was afterwards removed by the appellant, to this honorable Court, by writ of error, where the judgment was in all things affirmed; and that a mandate had been thereupon issued to the said Circuit Court, commanding further proceedings in the last mentioned Court, in accordance with the judgment of the Supreme Court:

Record, p. 9.

That the appellant was ready and willing to pay all costs, in either Court, in the ejectment suit, as soon as such costs could be ascertained. That unless restrained by the Court, the appellees would sue out the writ of possession, upon the judgment, and the appellant would be evicted from the premises first described, to his great and irreparable injury; his said paper mill, at the lock, and the fixtures and machinery being of the value of $8,000 00:

Record, p. 9.

That the appellant had paid all costs and charges of the action in the Circuit Court:

That he was ready and willing to pay to the appellees all rents to which they were justly and equitably entitled under the provisions of the said leases, and the interest thereon, if any were due, if they would accept the same and waive the said forfeiture as to the first mentioned lease:

Record, p. 10.

That desiring to come to a fair accounting with the appellees, of and concerning the rents claimed under the said leases, respectively, the appellant had endeavored to ascertain the amount which the appellees claimed to be due them for rents, and to that end, that he had, on the 22d day of April, then last past, (the bill being filed 6th June, 1866,) by his attorney and counsel, addressed to one of the attorneys at law of the appellees, in the ejectment suit, a written request, respectfully asking to be informed, 1st. When did the rights of the appellees accrue, and from what date did they claim? 2d. For how many "powers" did they claim? 3d. What credits did they allow for inadequate supplies? (meaning of water.) And that to these inquiries, the appellant had received no answer:

Record, page 10.

That the appellant had not been able to ascertain the precise time, when the rights of the appellees accrued, as landlords, nor what they did claim as due them as such; though the appellant believed, and, therefore charged, that neither of the appellees had any right, or title, or claim to any rents, until the 2d day of October, 1857, which the appellant was informed was the date of the conveyance of the canal and its appurtenances, from one Jeremiah Jackson to the appellee, Paine, and which conveyance was prior to any right or title by the other appellees:

Record, p. 10, 11.

That prior to the conveyance to Paine, and as far back as the period during which the State was landlord, and down through successive proprietorships and agencies, the appellant's mill was often, and for a much longer period than one month in the year, through all the years preceding the 2d day of October, 1857, inadequately supplied with water, although no water was ever withdrawn or resumed by the State, for purposes of navigation, nor had the canal ever been used for purposes of navigation, or

finished, as contemplated by the provisions of the "act to provide for a general system of internal improvements:"

Record, p. 11.

That there had been, generally, and always, water in the canal, or that could have been introduced into the canal, from the feeder, eight miles north of Indianapolis, by the use of proper and reasonable efforts, adequate and sufficient to supply the appellant's said mills, and all the other mills and works dependent upon the canal for their supply; and that this was the case, especially, since the said second day of October, 1857, and during all the succeeding time until the then present time:

Record, p. 12.

That over and beyond the one month in each year, provided in the lease, for which time there needed to be no supply furnished, the appellant had been deprived of the required supply, according to the lease, as follows:

For the time from the 2d day of October, 1857, till 1st of January, 1858, he was deprived of a supply, 15 days, for which he was entitled to an abatement of the rent, for that period, of.....	$31 00
And from 1st of January, 1858, till 1st of January, 1859, he was deprived 199 days.....	437 00
And from 1st of January, 1859, till 1st of January, 1860, he was deprived 173 days.....	379 00
And from 1st of January, 1860, till 1st of January, 1861, he was deprived 198 days.....	433 00
And from 1st of January, 1861, till 1st of January, 1862, he was deprived 132 days.....	289 00
And from 1st of January, 1862, till 1st of January, 1863, he was deprived 143 days.....	313 00
And from 1st of January, 1863, till 1st of January, 1864, he was deprived 138 days.....	302 00
And from 1st of January, 1864, till 1st of January, 1865, he was deprived 192 days.....	420 00
And from 1st of January, 1865, till 1st of May, 1865, he was deprived 21 days.....	45 00
	$2,649 00

Record, p. 12.

And that the appellent was entitled
sums, from the rents claimed under th
offered to set off said sum against so m

Ib.

That the appellees were equitably a
appellant, in the sum of $679.49 for n
expended by him, to and for the use of
repairing breaches and removing obstru
which the water was supplied, in the ye
$214 for the interest on said sum, mak
that these expenditures were indispens
sary to the running of his said mill, wh
mills dependent upon said Canal for a s
been erected at the said point under lea
appellant; and that there being no one f
lord, whoever he was, the appellant a
forced, either to have the work done th
to stop for an uncertain period, to their
age and injury; wherefore the appellan
tled, in equity, to an abatement from t
sum of $893.49; and he offered to se
much of said rents:

Record, pp. 13, 14.

That the inadequacy of the supply
culpable negligence and gross careless
their agents, in failing to repair breache
ring from time to time; and in failing
the flow of water in the Canal, created
the bottom and sides of the Canal, and
and by the caving in of the banks, and
might have been overcome and remov
vigilance, within a space of time, less t
gate, in any one year; and that by reas
gence and gross carelessness, the app
adequate supply, as set forth in the fore
2d day of October, 1859, till the 1st o
yond the one month allowed by the le
such deprivation the appellant necess
in wages paid to hands employed by h

vas never water furnished
when properly applied to a
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four and a half feet mill
of paper:

the superintendence of the
r, failed, and the appellant
wheels of less diameter,
el, and to change them at
o large expenses:
r portions of the said sur-
similar to those specified
andes; which grants were,
therefore the appellant to
there was not enough for
at regard, had been wholly
the agents of the State,
the rights of the State,

tenants, had been and con-
pplied, by drawing off all
appellant's mill, to supply
cant supply for all, in the
eing such, in reference to
from the Canal, that the
and run, when the appel-
but a partial supply; and
eat injury of the appellant:
ined by the appellees, but
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en, erected a Paper Mill on
the Lock, and caused the
of appellant's mill, to be
er there was an inadequate
epair the Canal below the
nsiderable injury.
he one made to the appel-

finished, as contemplated by the provisions of the "act to provide for a general system of internal improvements:"

Record, p. 11.

That there had been, generally, and always, water in the canal, or that could have been introduced into the canal, from the feeder, eight miles north of Indianapolis, by the use of proper and reasonable efforts, adequate and sufficient to supply the appellant's said mills, and all the other mills and works dependent upon the canal for their supply; and that this was the case, especially, since the said second day of October, 1857, and during all the succeeding time until the then present time:

Record, p. 12.

That over and beyond the one month in each year, provided in the lease, for which time there needed to be no supply furnished, the appellant had been deprived of the required supply, according to the lease, as follows:

For the time from the 2d day of October, 1857, till 1st of January, 1858, he was deprived of a supply, 15 days, for which he was entitled to an abatement of the rent, for that period, of.....	$31 00
And from 1st of January, 1858, till 1st of January, 1859, he was deprived 199 days.....	437 00
And from 1st of January, 1859, till 1st of January, 1860, he was deprived 173 days.....	379 00
And from 1st of January, 1860, till 1st of January, 1861, he was deprived 198 days.....	433 00
And from 1st of January, 1861, till 1st of January, 1862, he was deprived 132 days.....	289 00
And from 1st of January, 1862, till 1st of January, 1863, he was deprived 143 days.....	313 00
And from 1st of January, 1863, till 1st of January, 1864, he was deprived 138 days.....	302 00
And from 1st of January, 1864, till 1st of January, 1865, he was deprived 192 days.....	420 00
And from 1st of January, 1865, till 1st of May, 1865, he was deprived 21 days.....	45 00
	$2,649 00

Record, p. 12.

And that the appellent was entitled to an abatement of said sums, from the rents claimed under the said first lease; and he offered to set off said sum against so much rents:

Ib.

That the appellees were equitably and justly indebted to the appellant, in the sum of $679.49 for moneys paid, laid out and expended by him, to and for the use of the appellees, in and about repairing breaches and removing obstructions to said Canal, from which the water was supplied, in the year 1858; and in the sum of $214 for the interest on said sum, making together $893.49; and that these expenditures were indispensably and absolutely necessary to the running of his said mill, which, together with the other mills dependent upon said Canal for a supply of water, which had been erected at the said point under leases similar to that of the appellant; and that there being no one found representing the landlord, whoever he was, the appellant and the other lessees were forced, either to have the work done themselves, or have their mills to stop for an uncertain period, to their great and irreparable damage and injury; wherefore the appellant claimed that he was entitled, in equity, to an abatement from the amount of rent, to the sum of $893.49; and he offered to set off said sum against so much of said rents:

Record, pp. 13, 14.

That the inadequacy of the supply, was owing, solely, to the culpable negligence and gross carelessness of the appellees and their agents, in failing to repair breaches in the Canal banks, occurring from time to time; and in failing to remove obstructions to the flow of water in the Canal, created by the growth of grass in the bottom and sides of the Canal, and by abrasion of the banks, and by the caving in of the banks, and other causes; all of which might have been overcome and removed by proper exertions and vigilance, within a space of time, less than a month in the aggregate, in any one year; and that by reason of such culpable negligence and gross carelessness, the appellant was deprived of an adequate supply, as set forth in the foregoing statement, from the 2d day of October, 1859, till the 1st of May, 1865, over and beyond the one month allowed by the lease, and that by reason of such deprivation the appellant necessarily and unavoidably lost, in wages paid to hands employed by him in and about said mill,

whilst the mill was partially, irregularly and spasmodically supplied with water, during said period, ... $5,010 55
The average interest on which, is..... 901 90
And that the injury sustained by his mill and the machinery attached to the mill, by reason of its having to stand more than half the time for want of water, was, at least, ~~$2,000~~ a year more than if it had been running regularly, as contemplated in the lease, 7 years, at ~~$2,000~~ 14,000 00
And he claimed that he was entitled to interest on one-half of the value of his mill and machinery for the proportion of time lost for want of the required supply. The mill and machinery being then of the value of $10,000, the interest for seven years, is..... 2,275 00

$9,587 45

Record, p. 15.

That the appellant was equitably entitled to recover from the appellees, the last mentioned sum, after first deducting the balance due for rents according to the lease; and he offered to set off so much of said sum as would satisfy said rents in full; and that the appellees should account with and pay to the appellant the damages by him so sustained:

Record, p. 15.

That although the appellant had his mill erected, and in proper running order, with the proper machinery affixed and attached, and the proper gearing for running the mill, and the proper wheel, as prescribed in the lease, in the year 1839, and proceeded to manufacture paper; yet the quantity of water flowing to said mill, to be used in propelling the machinery, was never accurately guaged by any engineer or other authorized agent of the State; nor was the quantity of water deemed or found necessary, ever certified by any engineer on the back of the lease, or by any separate writing, nor had such indorsement been made by any person; wherefore the exact quantity or amount of water intended to be leased, had never been fixed or determined, according to the intention and terms of the lease.

The appellant, however, admits that it was understood that he would be, and was, entitled to a supply equal to 4 "powers," and that he had paid rents according to that understanding; and he therefore claimed that he was entitled to that much.

Record, p. 16.

The bill further charges, that there was never water furnished him, at a level high enough to propel, when properly applied to a Pitch Back or High Breast wheel of eleven feet diameter, with the proper gearing, to propel four run of four and a half feet mill stones when applied to the manufacture of paper:

Record, p. 17.

That the wheel, although built under the superintendence of the proper engineer and acting commissioner, failed, and the appellant was therefore forced to substitute other wheels of less diameter, from time to time, and of different model, and to change them at different times, thereby subjecting him to large expenses:

That the State granted leases of other portions of the said surplus water, to other parties, upon terms similar to those specified in the lease to the appellant and said Yandes; which grants were, however, subsequent to theirs, entitling therefore the appellant to a preference over the other tenants, when there was not enough for all; but that the appellant's rights, in that regard, had been wholly disregarded, from the beginning, both by the agents of the State, and the parties who had succeeded to the rights of the State, including the appellees.

That the practice of those lessees and tenants, had been and continued to be, to have their own mills supplied, by drawing off all the water that could be drawn from the appellant's mill, to supply their own mills, whenever there was a scant supply for all, in the Canal; the position of the other mills being such, in reference to the level at which the water was taken from the Canal, that the other mills could be and were supplied and run, when the appellant's mill would have to stand, or have but a partial supply; and that this had been done, often, to the great injury of the appellant:

That this practice had not been restrained by the appellees, but that, on the contrary, the appellant believes it was approved by them or their agents—one Gay, their general agent, having within two years, in partnership with one Braden, erected a Paper Mill on the Basin below the appellant's mill, at the Lock, and caused the arm of the Canal opposite the forebay of appellant's mill, to be deepened, to draw from his mill, whenever there was an inadequate supply in the Canal:

That the appellees had neglected to repair the Canal below the appellant's mill, thereby causing him considerable injury.

Record, pp. ~~20, 21~~. 18, 19.

In regard to the second lease, being the one made to the appel-

lant alone, the bill charges, that he was put in possession of the piece of land and the water power thereon described, under and in virtue of that lease, bearing date 1st of January, 1840, whereby, under like restrictions, the State agreed to sell and lease to the appellee, for the term of thirty years from the said 1st of January, 1840, the use of so much of surplus water of said canal, not required for the purposes of navigation, at the north end of the upper basin, in Indianapolis, adjoining and immediately north of the upper tumble, as would be sufficient when properly applied on an "over-shot" wheel of 16 feet diameter, with the proper gearing, to be approved by the acting commissioner and engineer having charge of that portion of the canal, to propel two run of 4½ feet mill stones, to be applied to the manufacture of "wrapping paper;" and that the appellant should pay to the State a yearly rent of $150 for each power, it being understood that a "power" meant a quantity of water which would be sufficient, if applied to such a wheel, to propel a run of 4½ feet mill stones, grinding, at an average, five bushels of wheat per hour.

Record, p. ~~22~~ 19.

And it was *provided*, in that lease, that the appellant should not be deprived of the use of the water, by any act of the State, or its agents, or by the inadequacy of the supply of water, for more than one month, in the aggregate, in any one year; and that if, for the purpose of repairing the canal, preventing breaches, removing bars, or other obstructions, or making any improvement in the canal, or the works connected therewith, or in consequence of breaches, or an inadequate supply of water, the appellant should be either partially or wholly deprived of the use of any portion of the water power thereby leased, so as to prevent the operation of any of the hydraulic works usually propelled by such power, such deductions should be made from the rent accruing on such portions of the water power, as the appellant should be prevented from using, as would bear the same proportion to the yearly rent thereof, as the time during which the appellant had been deprived of its use, bears to eleven months; the rent to commence on the 1st day of July, 1840, and to be paid semi-annually, on the 1st day of May and November, in every year, to such agent of the State as might be authorized to receive the same; and that if, at any time, any instalment which might become due for rent, should remain unpaid for one month from the time it should become due, or if the lessee should violate or fail to comply with any of the stipulations con-

tained in the lease, then all the rights and privileges secured to the lessee should cease and determine; and any authorized agent of the State, or lessee under the State, should have the power to enter upon and take possession of the premises, and resume all the rights and privileges thereby granted; and the lessee should, moreover, be liable to pay all damages consequent upon such violation; and the said State, in consideration of the said rents and agreements, agreed to lease to the appellant, upon the same conditions, restrictions and limitations, such part of the ground belonging to the State, at the point above mentioned, as, in the opinion of the engineer having charge of that portion of the canal, might be necessary to the use of the water power thereby leased, for the like term of thirty years from the 1st day of January, 1840, the particular portion of ground to be staked off and designated by said engineer, to wit, the parcel of ground secondly mentioned:

Record, p. ~~23, 24~~. 21, 22.

That the appellant went into the possession of said ground, last mentioned, and in the year 1840 erected at the point designated, a wrapping paper mill, as contemplated in the last mentioned lease, the gearing having been approved by the acting commissioner and engineer:

That he manufactured wrapping paper at the mill last mentioned, as the supply of water would enable him, until the year 1850, when it was wholly and finally abandoned by him, and it was never afterwards used by any one:

Record, p. ~~24~~. 22.

That the supply, for several years preceding such abandonment, was so irregular and scant, that to afford a reasonable supply for his other and principal mill at the "Lock," before mentioned, and the other mills, on the same level, it was often necessary to stop the running of the mill at the "Tumble;" and that such occasions occurred so frequently, that they destroyed the value of the wrapping paper mill, rendering it worthless to him, and a continued expense, without any profit:

Record, p. ~~25~~. 23.

That the State, previous to the sale of the Canal, and the other parties who became the owners, or the claimants, under the State, immediately or remotely, by the abandonment and discontinuance of the appellant's, mill, at the Tumble, were materially and essentially benefited by the discontinuance of the mill at the Tumble, because the water that would have escaped from that mill, if run-

ning, would have been so much withdrawn from the other mills and machinery, at the Lock, and below, on the Basin; and the continued running of the mill at the Tumble, would have often stopped the other mills, wholly or partially; and so, either absolved the tenants from the payment, of any rents, for the time being, or materially reduced the amount:

Record, p. ~~25~~ 23

That often, the deprivation, or the inadequacy of the supply, at all the mills, including those of the appellant, at the points mentioned, was owing, wholly, to the culpable neglect of the parties whose duty it was to keep the Canal in proper repairs, and to remove obstructions to the flow of water in the Canal; and that, for these reasons, and those before stated, the appellant was compelled to wholy abandon his mill at the Tumble, which abandonment was final, in the year 1850, and long before the appellees had any interest in said Canal, or in said leases:

Record, p. ~~26~~ 24

That the appellees are estopped from claiming any rents, under that lease, because, finding the said mill abandoned, when they purchased the Canal and its incidents, they treated such abandonment, as being a *reverter;* and accordingly the appellee, Paine, by his agent, removed, tore away, and destroyed the flume or trunk that had been constructed by the appellant, and maintained by him, at that point, to convey the water from the Basin to the wheel which propelled the machinery of the mill, thereby rendering the mill wholy useless, in all coming time, and destroying the mill site, unless the appellant had expended two or three hundred dollars, in restoring the flume, which under the circumstances, he had no encouragement to do so; and so the appellant says, the appellees did never supply water to the mill at the Tumble, and that no part of the rent stipulated for at that point, was in arrear:

Record, p. —. 24

That on the 13th of May, 1862, when the ejectment suit was pending, the appellant tendered to the attorney of the appellees $400, as in full for the $110.48, under the last mentioned lease for 6 months' rent between the 1st of November, 1859, and 1st of May, 1860, and the interest thereon from the date of the demand, and as in full of the $220.96 claimed to be due as aforesaid, under the first mentioned lease, for the same period, and the interest thereon, and as in full of the costs in the action of ejectment, amounting at the time to $14.40 over and beyond the costs which had been

paid by him previously; which tender was declined; which tender was sufficient; and which was brought into Court on the filing of the bill, and again offered, upon the condition that the appellees would waive the forfeiture aforesaid; and offering also to pay all rents which, upon a fair accounting, might be found to be due the appellees, under the first lease to the appellant and Yandes; but claiming that in equity he owed the appellees nothing, if he were allowed an abatement from the rents for the time for which he was so deprived of an adequate supply of water, as before stated, and were also allowed the damages so as aforesaid sustained and stated; all of which the appellant considered himself entitled to in equity; and that beyond such relief, that the appellant claimed to be entitled to a decree for the excess that should be found due him, on such accounting:

Record, pp. ~~27, 28.~~ 25, 26, 27.

That the appellant was not willing to do more than he had already done and suffered, to set aside the forfeiture of the lease made to himself; that if such forfeiture were set aside, he could derive no benefit; that no adequate supply of water could be furnished at the Tumble, as contemplated in the lease, without either destroying or greatly impairing the supply absolutely needed at the mill at the Lock, and those on the Basin below:

Record, p. ~~29.~~ 27

That the appellees had uniformly denied the right of the appellant, to any abatement of rents, except to a trifling amount in each year:

That by their bill of particulars, filed in their ejectment suit, the appellees claimed, that by virtue of the leases, large sums of money became due to the State for rents, of said premises, under the first mentioned lease; that the sum of $666.66 fell due the 1st of November and May every year, from the 1st of August, 1846, till the 30th of June, 1851; and under the last mentioned lease, that the sum of $333.33 fell due on the same days for the same period of time; and that the said several sums had never been paid to the State; that on the 2d day of October, 1857, the premises came to the appellees, by intermediate conveyance from the State, and that the appellant had never paid any rent, till the filing of the bill of particulars, which was the 3d day of June, 1860; from which several averments, the appellant was induced to believe that the appellees would claim the rents thus claimed to be due and unpaid; but that the appellant insists that he is not responsible to the appellees

in law or equity, to do more than pay them whatever rents might be due and owing fairly, computing the time of the commencement of the rights of the appellees, from the time that they, or some one of them, received a conveyance of the State's interest in the premises, which time, as shown by the bill of particulars, was the 2d day of October, 1857:

Record, pp. 29, 30.

That the appellant was willing and offered to submit to such conditions and terms as the Court might see fit to impose, to secure to them all rents that might, upon a fair accounting, be found due them under the lease to the appellant and Yandes, and to give sufficient surety to abide by and perform any order that might be made in the premises:

Record, p. 31.

That the appellant was not estopped by the verdict and judgment in the ejectment suit, from denying that water was furnished according to the leases.

Ib.

The relief prayed for was, that the Court should, on the final hearing, injoin the appellees from enforcing the judgment at law, and order it to be entered satisfied; that the forfeiture of the lease to the appellant and Yandes should be set aside; and that the appellant should hold for the remainder of his term, according to the terms and conditions of that lease; that the appellant should recover the damages by him sustained, for the causes mentioned, and in the mean time, and until the final hearing, that the proceedings and judgment in ejectment should be stayed.

Record, p. 31.

A temporary injuction was granted on the filing of the Bill.

Record, p. 33.

At the succeeding term, the appellees appeared by counsel, and demurred to the Bill for want of equity.

Record, p. 35.

The demurrer was sustained, but the Court, at the same time, ordered, that the appellant had leave to amend his bill, the Court being of opinion, that the appellant was not entitled to be relieved from the consequences of his forfeiture, unless he should amend his Bill so as to tender all the rent, with the interest, that had accrued, *on both leases* since the suit in ejectment was begun, and bring the same into Court; and the Court, by said order, found that there was due for rent, on the lease to Yandes and the ap-

pellant, from 1st May, 1860, to 1st May, 1866, including interest, $4,494 50; and that there was due on the lease to the appellant, during the same period, with interest, the sum of $2,247.25; and it was therefore ordered, that the injunction should be dissolved, unless the appellant should so amend, tendering said sum, and bringing the same into Court by the 1st day of June, then next.

Afterwards, on the 26th of May, 1866, the appellant by his counsel and solicitor, excepting to the opinion of the Court sustaining the demurrer to the bill, informed the Court that he declined to amend his bill so as to tender all the rent with interest that had accrued on both leases, and bring the same into Court, to-wit: $4,494.50, as computed and found by the Court to be due for rent on the lease to Yandes and the appellant, from the 1st of May, 1860, to 1st of May 1866, including interest; and $2,247.75, so as aforesaid computed and found to be due for rent, including interest, on the lease to the appellant.

Wherefore, it was ordered and adjudged by the Court, that the appellant's bill of complaint should be and was dismissed by the Court, for want of equity, and the injunction was dissolved at the costs of the appellant; to which rulings of the Court the appellant, at the time excepted, and prayed and appeal from the judgment and decree to the Supreme Court, which was granted, the appellant executing the appropriate bond, in the penalty of $10,000, with an approved surety, conditioned according to law and the rules of the Court, for the due prosecution of his appeal.

Record, pp. ~~36, 37, 38~~.

ARGUMENT AND BRIEF.

The Circuit Court having sustained a demurrer to the appellant's bill, for want of equity, the paramount question for the consideration of this honorable Court, is, of course, the correctness of that decision; and if it shall be held by this tribunal, that his bill embraces a subject proper for the interposition of a Court of Equity, the remaining question would be, what relief is the appellant entitled to?

The bill was exhibited, mainly, to stay the judgment in the ejectment suit, as to the premises demised by the State to one Yandes and the appellant, on the 12th of February, 1839, for 30 years from the 1st of January, 1839, and which had been declared and treated as forfeited to the appellees, as the assignees of the State's interest. The forfeiture was for the failure of the appellant to pay $220.96 for 6 months' rent, due 1st of May, 1860, and for nothing else, as is shown by the verdict of the jury.

It is true, that after the demurrer was sustained, leave was granted the appellant to amend his bill, but the permission to amend, was clogged by such an onerous condition, that, with the sincerest respect for the distinguished judge who imposed it, was felt to be most oppressive upon the appellant, and inequitable, assuming as we suppose we have the right to assume, that the facts alleged in the bill of complaint must be held to be true.

The ejectment suit embraced premises covered by two several and independent leases, executed on different days, and to different parties, one of them to Daniel Yandes and the appellant, the other to the appellant alone; and yet, the Court ruled, that the two, for all the purposes of this suit, must be regarded as "one and indivisible," and that therefore, an ample tender, for the purpose of redeeming either one of them, would be of no avail, unless it should be sufficient to cover the other one also; and so it was required, in the order permitting the amendment of the bill, that the appellant should tender and bring into Court, for the appellees, all that was called for, by the letter of each one of the leases, without any abatement whatever; and this, notwithstanding the appellant had dis-

tinctly stated in his bill, that he did not claim to have the forfeiture of the lease to himself set aside; and that therefore he would allow the forfeiture of that one to stand.

Whether the reasons assigned by him for insisting upon the relief claimed, as to that lease, were or were not sufficient for the purpose, is, I admit, a question in the case; but I respectfully submit, that it was not a question in determining whether or not the appellant had done and offered to do what would clearly entitle him to have the lease to Yandes and himself reinstated. That lease was entitled to be considered, in all its aspects, as if no other lease had ever existed between the State and himself.

The appellant would unquestionably have had the right to pay the sum demanded for the quarter's rent of the premises held under the first lease, had he elected to do so. And if he had done this, certainly the appellees could have declared no forfeiture as to that lease. The demands were separate and distinct acts, for distinct sums, and must have been, and were, made at different places. If, then, the demand for $220.96 for 6 months' rent to 1st May, 1860, of the Paper Mill premises, at the Lock, had been responded to, by a tender of that sum, could the appellees have enforced a forfeiture of that lease, because the demand made at the Wrapping Paper Mill premises, at the Tumble, for the $110.48, claimed to be due under that lease, was not also complied with?

It does seem to me, that the question can be answered only in the negative; and if so, it must settle the question in favor of the appellant. He had clearly the right to save *either* premises, and let the other slide, if it pleased him. The appellees might claim "the bond," to the letter, of either lease; but no blood could be drawn, according to the terms and conditions of either, because there had been a default made in a condition of the other.

If, therefore, the position thus indicated be correct, it must follow that the conditions and restrictions imposed by the learned judge, in his leave to amend, requiring a tender of every penny that could possibly be computed, to be in arrear, under both the leases, without the abatement of a dime, for scant supply during the whole 6 years so computed, and without permitting any reference or inquiry in regard to the question of scant or full supply, cannot be sustained,

The bill of complaint *may not* show a case that should entirely and fully absolve the appellant from all his obligations under the lease of the premises at the *Tumble;* but if it should be held that

it does not, still its defects, in that regard, cannot fatally, or even injuriously, affect the *status* of the lease at the Lock.

I now proceed to show that the bill of complaint, as to the lease at the Lock, does contain sufficient equity to entitle the appellant to be relieved, as to that lease.

It was assumed on the other side, in the Court below, that the lessees could claim nothing by way of set-off, or recoupment, for any damages or injury sustained by them, consequent upon their failure to supply water, except an *abatement of rents*, for such time as they might have been deprived of the specified supply, beyond one month in each year, however culpable the appellees might have been, in failing to furnish the stipulated supply.

The appellant does not admit the theory, unless it could be shown that the appellees had used some diligence to furnish the requisite supply. The bill however not only denies that any proper efforts were put forth by the appellees, or their agents, to keep up a supply, but it is averred, that the appellant was deprived *by the culpable carelessness and gross negligence* of the appellees, and their agents, in failing to repair breaches in the Canal and its banks, occurring from time to time, and in failing to remove obstructions to the flow of water, caused by the growth of grass in the bottom and sides of the canal, and by the abrasion of the banks; all of which, it is averred, might have been removed, repaired, and overcome, by proper efforts, within a space of time, less than "a month, in the aggregate, in any one year."

And it is also averred, that there was generally, in the canal, or that could have been readily introduced into it, from the feeder dam, eight miles north of Indianapolis, by the use of proper and reasonable efforts, water, adequate and sufficient to supply the appellant's said mills, and all the other mills dependent upon the canal for a supply.

If these averments would not entitle the appellant to damages against the appellees, as well as to an abatement of rents, then the latter would not be liable, had they cut the Canal banks, and thereby deprived the appellant eleven months in the year.

The demise of the water power and the land, is equivalent to a covenant that the water *shall be supplied.*

"No particular words are necessary to constitute a covenant in a lease. It is sufficient if it be such as to show the intention of

the party to bind himself to the performance of the matter stipulated for."

Smith's Landlord and Tenant, p. 96.

"The *reddendum*, is an implied covenant, and in the absence of an express stipulation to pay the rent, would be sufficient, in law, to sustain the action of covenant."

Ib. 97.

"Covenants are to be construed according to the apparent intention of the parties, looking to the whole instrument, and to the context, and the reasonable sense and construction of the words; so that a covenant is broken if the intention is not carried out, although it may be kept to the letter."

Ib.; and Comyns' Dig., "Covenant E."

Numerous cases are referred to, of covenants, which have received a larger interpretation than the words, taken litterally, would warrant.

Applying these rules to the case, it would only be carrying out the intention of the parties, to hold that the appellees were bound to use at least reasonable efforts to keep the canal in suitable repair, as a means, and an indispensable means, to the supplying of the water contracted for. And if they failed in this most essential particular, why should they not be held liable for the consequences of the omission?

The leases, although granted by the State, are to be construed in the same manner, and with the same regard to the mutual rights and obligations of the respective parties, as if the lessor had been a private citizen, and therefore, the appellees can claim no immunity on account of their title being derived from the sovereign State of Indiana.

The general rule, that unliquidated damages cannot be set off or recouped in an action at law, is admitted; but the rule does not hold in equity, *which is independent of statutes of set-off;* and, besides, this being a suit in equity, the court will see to it, that the decision shall settle the mutual rights of the parties, fully and completely.

That the appellant is legally entitled to be credited with the time, over one month in the year, he was not supplied, is provided for, expressly, in the leases.

That he was not credited one cent for such loss, for the whole six years preceding the first of May last, that being the period to which the arrears were computed by the court, is apparent.

But it was objected, and His Honor sustained the objection, that the application of the appellant, for relief, came too late; and that he should have brought his suit to set aside the forfeiture, at the earliest moment practicable.

What that moment was, was not specifically indicated; but it is denied that there was any unnecessary or unreasonable delay.

The bill was filed previous to the reception of the mandate from the Supreme Court, in the Clerk's office of the Circuit Court, upon the decision of this Court in the ejectment suit. This is shown by the record.

The only delay, therefore, was in awaiting that decision, before the bringing of this suit; and, I suppose, the appellant can be chargeable with no impropriety, or even of the slightest discourtesy, toward the appellees, or the court below, for bringing his writ of error in that suit; and that, therefore, no such extreme penalty should be visited upon him for that cause, as to bar this suit.

I do not forget the principle that, in certain cases, a party must act promptly, to avail himself of a remedy; but this is not one of them.

At law, the appellant had been deprived of his tenantcy by the judgment of a court, for failing to pay, *on demand*, a small sum. But he chose to test the correctness of that judgment, in the appellate court, as he had a perfect right to do. That appeal was prosecuted, and, though unsuccessfully, yet, without any unnecessary delay; and when his defeat was announced, he immediately filed his bill for relief.

This does not fasten *laches* upon him. The relief claimed, did not rest upon a stale claim, or cause of action.

But the rule requiring diligence in the assertion of a claim, like this one, was never recognized, so far as I am informed.

The bill was filed before an "execution was executed" in the ejectment suit, and it was, therefore, in time.

The appellant might have elected to apply for a stay of proceedings in the ejectment suit, before trial, but he was not restricted to that remedy.

The doctrine is thus stated by Mr. Archbold:

"In ejectment for non-payment of rent, if the tenant, or his assignee, (or the mortgagee of the term, 3 Taunt., 402,) shall, at any time before trial, (see 2 B. & C. 490; 4 D. & R. 45; 7 East, 363 or *at any time before execution*, after a judgment against the casual ejector, 2 Strange, 900), pay or tender to the landlord, or

pay into court, all the arrears of rent and costs, (see 4 Taunt. 883) all further proceedings shall cease."

2 Archbold's Pr. 208.

Tidd, in reference to the same subject, says;

"Before the Statute of 4 Geo. II, C. 28, it was usual for the court to stay the proceedings in ejectment, on a clause of re-entry for the non-payment of rent, *at any time before execution executed*, on the tenants bringing into court, all the rents in arrear, and costs." And that since the statute, which requires such payment or tender *before the trial*, it has been holden, as before, that *after judgment* against the casual ejector, *and before any writ of possession executed*, the court will stay the proceedings, on payment of all the rent and costs."

1 Tidd's Pr. 485, 2 Am. Ed., referring to 2 Salk. 597; 10 Mod. 383; 8 Mod. 345.

"Courts of Equity interpose to restrain proceedings at law for the recovery of penalties. And a common instance of this relief, is that which is given against a clause of re-entry for the non-payment of rent."

1 Waterman's Eden on Inj.: p. 44, and the authorities referred to, at pp. 44–6, top paging.

"And it need not necessarily appear, that the failure in paying rent, arose from any accident or insolvency; but the court would interfere, *even if the tenant's default should have been negligent or wilful.*"

Ib. 45 (note 1), referring to 12 Vesey, 289.

"Equitable relief against forfeitures, is a doctrine universally recognized."

2 Story's Equity Juris., § 1313, 1315–16.

And the order granting leave to amend, is itself a recognition of of the appellant's right to be relieved, on the payment of the rents due; the only objection to that order, being, that it denies to the appellant all opportunity to contest the amount claimed as due, a right which is explicitly provided for in the leases, and which is also provided for by acts of the legislature.

In the year 1850, an act was passed "to authorize the Governor of Indiana to compromise with and cause suit to be brought against the lessees of the water of the northern division of the Central Canal."

Acts of 1850, p. 21.

By the third section of that act, the Governor was authorized to

sell all the State's interest in the canal, and all the rents which should become due, after the sale, and the water power and appurtenances thereunto belonging, to the highest bidder; and that section has this clause: "The purchaser or purchasers shall execute to the State of Indiana, and deliver to the Governor a bond, with ample security, conditioned to indemnify the State, forever thereafter, against all damages, claims, or demands which the State may be subjected to, or liable for, on account of any deficiency in the supply of water to such lessees, their heirs, or assigns."

At the next succeeding session, "a Joint Resolution on the subject of the sale of the northern division of the Central Canal," was adopted, (approved February 7, 1851), by which it was recited that the Governor had reported a sale; and he was directed to convey to the purchasers, their heirs or assigns, upon the payment of the purchase-money, and the execution of the required bond.

Acts of 1850–51, p. 200.

An act was also passed at the same session, approved February 13, 1851, entitled "An act to incorporate the Central Canal Manufacturing, Hydraulic, and Watar Works Company," the 9th section of which provided that the Governor should make the conveyance to the said Company, or any member thereof, or to any other person or persons who might obtain an assignment from the purchasers, (who were George G. Shoup, James Rariden, and John S. Newman,) in as full and ample a manner as the Governor could or should do, to said purchasers or assignees, on executing the required bond to the acceptance of the Governor.

And the proviso to that section is as follows: "*It is further provided*, that the lessees from the State, upon said canal, shall have the right to sue said assignees, in any court of competent jurisdiction, for any damages they may sustain, from the neglect or failure of said assignees to furnish them water, or do any other thing the State hasagreed to do."

And the 10th section of this same act also provides, that "the property so conveyed to said assignees, shall be forever held and bound for the faithful performance of the conditions of said bond, for the benefit of the lessees, and all other persons interested."

Local Laws of Ind., 1850–51, p. 358.

I therefore submit, that these enactments are parcel of the contract of sale of the water power and leases; and that they confer upon the lessees, expressly and clearly, a right of action against the purchasers and their assigns, for the special grievances set forth in

the appellants complaint, independently of the bond; and that in conjunction with the bond, which is expressly declared to be for the benefit of the lessees, they constitute a lien in their favor, upon the canal and its incidents, equivalent to a mortgage, and that therefore, the purchasers of the canal and of the leases, under that act, and their assignees, are liable to the lessees for any damages they may have sustained, on account of any deficiency in the supply of water. The bond can not be regarded as having been intended, simply to indemnify the State. Such a construction of the act would stultify the Legislature which passed it, because the State could never be injured nor made liable for any damages whatever to the lessees, for a failure to supply water.

There is yet another act of the Legislature bearing on the same subject, which, in the court below, was denounced as retroactive, and a nullity; but which, although passed after the rights of the appellees had attached, invades no pre-existing rights, but simply re-affirms and carries out the legislative intention, as embodied in the statutes already quoted.

The act referred to, was passed the 9th of March, 1859, entitled, "an act for the relief of the lessees from the State, of the water power and other privileges on the Northern Division of the Central Canal," &c.

Acts of 1859, p. 167.

The preamble to the act contains a reference to all the preceding legislation on the subject, material to the present case.

It refers to the act authorizing the sale of the canal, the consummation of the sale, and its approval by the legislature; the act incorporating the Central Canal Manufacturing, Hydraulic and Water Works Company; the conveyance to Conwell; the execution of the bond to the State, with the condition to indemnify the State; and authorizing the lessees to sue upon that bond; and declaring that it had been represented to the legislature, that the lessees of the water power had not been supplied with water, according to the leases; and that Conwell and his assigns had failed to supply them; that the obligors in the bond were either dead, insolvent or non-residents, leaving the lessees without adequate remedy; and it was therefore enacted, "that Conwell's bond should be held to be in trust, and for the nse of the lessees, and each of them, their heirs, &c., and to be as obligatory as if so expressed.

2d. That the lessees might sue upon the bond, either in the name of the State, or on their own relation, from time to time, for

any breach or breaches of the condition, and recover the damages sustained, &c.; and that in the same suit, or in a separate suit or suits, they might proceed against the property conveyed, to subject the same to the payment of such damages.

3d. That it should not be necessary in any such suit or proceeding, to show that the State had been damnified." And it is also provided, that in any such suit, the lessees should be charged with all rent due and unpaid.

If this series of legislation has any force whatever, it must certainly entitle the appellant to some relief for the wrongs which his bill discloses; and he cannot, I apprehend, be turned out of a court of equity, upon the ground that he has a remedy somewhere else, or in some other shape, or because he had been guilty of laches in bringing his bill.

It was not practicable to come to an equitable adjustment with the appellees, in regard to their claim against him, and especially, in regard to the extent of their claim, which, as the bill shows, they refused to reveal, until after the ejectment suit was brought.

The appellant being originally the tenant of the State, the appellees were entitled, at the utmost, only to rents which accrued after they were vested with *the legal title*, although they might have had the equitable title long before.

Mayne on the Measure of Damages, p. 129.

"Where land is conveyed, with full covenants, * * * the vendor is entitled to all the rents past due, at the time of the sale, and the vendee to all that falls due afterwards."

Page v. *Lashly*, 15 Ind. R. 152.

This being the law of the case, independently of any statute; and the statute authorizing the sale having expressly limited the right of the purchaser, to the rents that should accrue, after the sale, the appellees had no rightful claim to the rents past due; though they boldly claimed such right.

The sale was made in 1850; but the appellees had no interest in the property for several years afterwards, and although they set up such a claim soon after their purchase, they never made their claim specific, until the 1st day of June, 1860, when they limited it to six months rent accruing between the 1st of November, 1859, and the 1st of May, 1860.

See Abstract, p. 4, Record, 9.

It is shown, however, that the appellant applied to the appellees,

during the pendency of the ejectment suit, for a statement of their claim, for his information; but that his application was treated with silent contempt.

Abstract, p. 5.

But by their bill of particulars, which they were compelled to exhibit in the ejectment suit, it appears that they claimed for all the rents due the State, as well as other parties; the claim in fact, covering the whole of the time, from the 1st of January, 1840, till the then present time.

Record, p. [illegible]; Abstract 13.

These pretences being so iniquitous, the appellant could not do otherwise than risk the consequences, by defending the ejectment suit, he being advised by counsel, that if defeated in that suit, he might nevertheless be relieved in equity.

The appellant complains, also, that the quantity of water, to be supplied, (not less than three nor more than four "powers,) was never certainly determined, though it is admitted that four powers were understood; and this maximum was assumed by the Circuit Court, as the quantity actually furnished for the whole time, and without any abatement.

It does seem to me, with due deference, that this operation was *adding a penalty* instead of *mitigating a forfeiture.*

It is shown, also, that water was never furnished the appellant, at an elevation sufficiently high to propel the water-wheel described in the leases; and that this failure was a material injury, and the cause of extra outlays, in changing the wheels several times.

And it is also shown, that although the lease at the Lock, was older than any other, yet the appellees and their agents so managed the matter of the various supplies at that point, as to give a preference to the other and younger lessees, when there was not enough for all.

In regard to the lease at the Tumble, it is shown that the wrapping-paper mill erected there, was totally abandoned by the appellant, long before the appellees had any interest in the water power or the lease; and that such abandonment was an absolute necessity.

The bill of complaint specifies, particularly, wherein such necessity consisted; that the water in the canal was rarely, if ever, sufficient to supply all the mills at the Lock, on the Basin, and at the Tumble; that the one at the Tumble could only run when there

was a full supply at the other points; and the mill at the Lock, being of paramount importance to him, he was forced either to abandon the other one, or suffer incalculable injury in the endeavor to operate his principal mill at the Lock. And he shows, too, that the water that would have been used on his wheel at the Tumble, would have been thereby altogether withdrawn from the basin which supplied the other mills below; but that being retained in the basin, it contributed to supply the other lessees, as well as the appellant, at his principal mill; and that thereby, rents were derived by the appellees, for the use of the same water, at those other points.

And it is also shown, that the appellees, when they came into possession, recognized the abandonment of the mill at the Tumble, as an accomplished fact, as well as the necessity and propriety of the act, by removing altogether the flume or conduit which conveyed the water from the basin to the mill, the flume being a permanent and necessary structure for that purpose. It was claimed, therefore, that this conduct, on the part of the appellees, must, under the circumstances, be regarded as a *reverter* of those particular premises, and as a re-entry upon them by the appellees, with the assent of the appellant; and, as a consequence, exonerating the appellant from all liability for future rents.

In conclusion, I respectfully submit, that the bill shows a clear case for the appellant; that he did, and was willing to do, all that could be, in conscience, required of him, to reinstate his lease for his premises at the Lock:

That he was not compellable to offer to redeem the lease for the premises at the Tumble, as a *sina quo non*, to the redemption of the one for the premises at the Lock:

That the suit to redeem, having been instituted before the issuing of execution upon the judgment in ejectment, and, therefore, *before execution executed*, the appellant was entitled to the appropriate relief:

That the prosecution of his writ of error in this court, in the ejectment suit, was not such *laches* as to operate as a bar to the relief to which the appellant would have been otherwise entitled; and,

That the court, having jurisdiction of the [illegible] entertained the bill to settl[illegible]

was a full supply at the other points; and the mill at the Lock, being of paramount importance to him, he was forced either to abandon the other one, or suffer incalculable injury in the endeavor to operate his principal mill at the Lock. And he shows, too, that the water that would have been used on his wheel at the Tumble, would have been thereby altogether withdrawn from the basin which supplied the other mills below; but that being retained in the basin, it contributed to supply the other lessees, as well as the appellant, at his principal mill; and that thereby, rents were derived by the appellees, for the use of the same water, at those other points.

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That the prosecution of his writ of error in this court, in the ejectment suit, was not such *laches* as to operate as a bar to the relief to which the appellant would have been otherwise entitled; and,

That the court, having jurisdiction of the case, should have entertained the bill to settle all disputes and controversies between the parties, growing out of their said contracts.

J. MORRISON,
Solicitor and Attorney for Appellant.

Luciano Barbour
of Counsel for Appellant

In the Supreme Court of the United States.

WILLIAM SHEETS
vs.
HENRY R. SELDEN, and others.

Appeal from the United States Circuit Court for the District of Indiana.

ARGUMENT FOR THE APPELLEES.

In 1839 and 1840, the State of Indiana was the owner of the northern division of the Central Canal, which passes through the city of Indianapolis, and of certain adjacent lands. The canal afforded surplus water power in and near the city. An act of the Indiana Legislature authorized the Board of Internal Improvement "to cause such surplus water with such portions of ground belonging to the State as might be necessary to its use, to be leased." Code of 1838, p. 346.

Under this act a lease was made to complainant appellant and one Daniel Yandes, February 12, 1839, and a lease to the appellant, January 1, 1840. These leases were each for the term of thirty years. They reserved certain rents payable semi-annually, on the first of May and November, and provided that if any rent "should remain unpaid for one month from the time it shall become due," "all the rights and privileges" of the lessees "shall cease and determine, and any authorized agent of the State, or lessee under the State shall have power to enter upon and take possession of the premises," &c. The leases contained a further provision that the lessees should not be deprived of the use of the water by any act of the State, or its agents, or by the inadequacy of the supply of water, for more than one month

in the aggregate in one year: and that if for the purposes of repairing the canal, preventing breaches, or making improvements to the canal, or the works connected therewith, or the inadequacy of the supply of water, the lessees should be either partially or wholly deprived of the use of any portion of the power leased, so as to prevent the operation of any of the hydraulic works usually propelled by the water power leased, such *deduction* should be made from the rent accruing on such portions of the water power as the lessees should be prevented from using, as would bear the same proportion to the yearly rent thereof as the time during which the lessees might have been deprived of its use bears to eleven months. At the time the leases in question were made no law existed authorizing actions to be brought against the State.

Under two acts of the Legislature, the Governor sold so much of the canal, land, and water power as is embraced by said leases. Acts of 1850, pp. 21 22.

The Legislature, by a joint resolution, approved the sale and directed the Governor to convey the property as sold by him to the purchasers, their heirs, or assigns. Acts 1851, pp. 200, 201.

The purchasers assigned their contract to one Francis H. Conwell; and the Governor, in accordance with said joint resolution, on the 30th of June, 1851, conveyed the land and canal to Conwell. Through several intermediate conveyances, the appellees became the owners of this property.

Afterwards the appellant, being in possession, under said leases, and having refused for several years to pay rent, the appellees formally demanded, on the premises, the rents falling due on the first day of May, 1860. The appellant having failed to pay the rents, the appellees claimed that he thereby forfeited his leases; and they instituted, on the 23d day of June, 1860, an action of ejectment in the United States Circuit Court for the district of Indiana to recover the possession of

the property. The appellant entered into the consent rule and pleaded not guilty, and on a trial at the May term, 1861, there were a verdict and judgment for the appellees. But, the court supposing that a certain statute of Indiana required a new trial, as of course, in all such cases, set aside the judgment and verdict, and ordered a new trial. In July, 1862, another trial was had. There were again a verdict and judgment against the appellant. From this judgment the appellant prosecuted a writ of error to this court, where the judgment was at the December term, 1864, affirmed. The case is reported in 2 Wallace, 177.

On the 6th of June, 1865, (after the lapse of about five years from the commencement of the action of ejectment,) the present action was commenced. It is a suit in equity to enjoin the issuing of a *habere facias* on said judgment in ejectment and for a redemption of said lands from the forfeiture incurred for non-payment of rent.

The bill alleges that after the commencement of the writ in ejectment, and while the same was pending, the appellants tendered to the appellees four hundred dollars as in full for the particular rents for the non-payment of which the forfeitures were declared, and as in full for interest thereon and the costs of suit up to that time; and alleges that the same is brought into court for the appellees if they will accept the same and waive the forfeiture: but it tenders nothing for rents *subsequently* or previously accrued. It seeks to avoid such a tender by claiming an equity to set off against all rents a demand for damages on account of alleged breaches of certain supposed covenants, expressed and implied, contained in the leases.

These breaches are for—

1. Inadequacy in the supply of water to the appellants' mills, when, by the use of proper and reasonable efforts, an adequate supply might have been furnished.

2. Inadequacy of supply, owing to the culpable negligence

and gross carelessness of the appellees and their agents in failing to repair breaches in the canal banks and to remove obstructions created by the growth of grass in the bottom and sides of the canal, &c., and the expense of repairs alleged to have been made by the appellant to render the supply adequate.

3. Not prohibiting lessees under subsequent leases from drawing off needed water from appellant's mill to supply their own.

The bill alleges an excuse for not paying the rents on the lease of 1840, executed to the appellant alone, but it expressly declines to redeem that lease from forfeiture if it should be ascertained, on an account taken, that the appellant owes rent thereon to the appellees. Yet it seeks, while thus declining to redeem that lease, to enjoin the *whole judgment.* (See transcript, pp. 12, 13.)

The fact last mentioned, it seems to us, shows that the bill is bad for want of equity and that the demurrer was correctly sustained.

A fact previously mentioned seems to us likewise to be fatal to the bill. The tender of the rents, pending the ejectment, for which the forfeiture was declared, admitted that they were due. (2 Green, Ev., § 600.) No subsequent breach of any supposed covenant in the leases is alleged. He who seeks to redeem from a forfeiture must not only tender the rents in respect of which the forfeiture is declared, but all subsequent rents accrued. (Atkins vs. Chilson, 11 Metcalf, Mass. 114.) The bill, as we have said, does not tender such subsequent rents.

We think we might rest our defence upon these grounds alone.

But we regard the bill radically defective on other grounds. The demise of the water-power and land contained in the leases did not include, by implication, a covenant to supply a specific quantity of power or to keep the canal in repair.

(25 Ind. R., 409.) The leases contain an explicit provision limiting the redress of the lessees in cases of a privation of the use of a water, and this excludes any other redress. *Ibid.* That provision is that "if for the purposes of repairing the canal, preventing breaches, or making improvements to the canal, or the works connected therewith, or *the inadequacy of the supply of water*, the lessees shall be either partially or *wholly*" deprived of water, "such *deduction* shall be made from the rent accruing on such portions of the water-power as the lessees shall be prevented from using as will bear the same proportion to the yearly rent thereof as the time during which the lessees might have been deprived of its use bears to eleven months."

The officers of the Board of Internal Improvements and the lessees alike knew that there had never been any law which would authorize the State to be sued, and hence a mode of redress for the lessee was provided by which the rents might be diminished in certain cases where it would be a hardship on the lessees to be compelled to pay the full amount. And these deductions being precise in their character and in the nature of liquidated damages, might, of course, be proved in an action to recover rent or to enforce a forfeiture for non-payment of rent.

Whatever claims, therefore, for the reduction of rent the appellant had as against the appellees at the time the action of ejectment was brought, he might have proved in that action, and he is concluded by the judgment in that action from urging them in this.

But, if he were entitled now to claim to redeem by paying the rent due after allowing for such supposed deductions, we insist that he could only do so by presenting a bill founding his right to redeem solely upon that equity, and tendering a specific sum, so that the defendants might at once, if they so chose, accept the same; and that to ask that the defendants shall be constrained to await the tardy process of taking an

account, and, in addition, to load the bill with claims which have no equity in them, is to deprive it of all the equitable qualities of a bill to redeem. No court, it is believed, has never entertained such a bill, and courts have often lamented that the right to redeem forfeitures for non payment of rent has been carried so far as it has been.

Here is the case of a tenant, who having been sued in ejectment for a forfeiture for the non-payment of rent on two several leases, does not set up, (or, if he does set up, prove) that he ought to be allowed any deduction on such rent, a judgment of forfeiture is rendered, and (under an Indiana statute) he claims, as a matter of right, a new trial, which is granted to him upon that ground. Again, he omits to set up (or, if set up, prove) that he ought to be allowed any deduction from the stipulated rent, and a judgment of forfeiture is again rendered. From the latter judgment he prosecutes a writ of error to this court, where that judgment is affirmed. During all this period he has not sought the aid of a court of equity. But when (after the lapse of five years from the period when the first ejectment was brought) he suspects that a *habue facias* is about to be issued, he affects to discover an equity to prevent the enforcement of this judgment, and accordingly files this bill, in which he seeks to enforce the judgment of forfeiture as to both leases, while saying that, as to one of them, if the court should find that he owes rent, in respect of it, he will not redeem it, tenders nothing for rent accrued since the date of the judgment in ejectment, and loads his bill with claims which the leases do not allow, and which have no support whatever. If such a bill be sustained, it seems to us that it would be difficult to say that a forfeiture for the non-payment of rent could ever stand against the will of a litigious tenant, or that a clause in a lease providing for a forfeiture possesses any value whatever.

We need hardly to argue that the leases in question are

to be interpreted between the appellant and the appellees in the same manner as between the appellant and the State; and that the legislature could not, even had it sought to do so, in any manner, alter or affect the interpretation of those leases.

The judgment in ejectment was rendered at the May term, 1862, and the bill in chancery filed as late as June, 1865. The appellee submits that it was too late—that in a case like this the bill should be filed without any delay.

In the ejectment we recovered both demises upon the forfeiture for non-payment of rent, the appellant must redeem both from the forfeiture, or he can redeem neither. They were included in the declaration, in the verdict, (p. 2,) in the judgment, and in the appellant's tender and payment into court. (p. 11.)

To avoid this conclusion he states that in 1850 he abandoned one of the premises, and that the abandonment was acquiesced in by the owners of the canal, (p. 10.) That averment is inconsistent with the plea of not guilty which he filed in the ejectment, and also with the verdict and judgment, which found the rent to be due and unpaid on both premises at a later date than the supposed abandonment. The judgment of forfeiture rested on the fact that the lease was in force and the rent unpaid for six months, from 1st November, 1859, to 1st May, 1860.

The appellant seeks to be relieved from the forfeiture of his terms for non-payment of rent, and to restrain the judgment in ejectment of 1862. He must have tendered to appellee all that he has a right to demand before filing his bill.

Seeking equity he must do *equity* as well as comply with his legal obligations. The appellees were not liable to be sued in chancery until they had first an opportunity to do what chancery would require, therefore he should have tendered them the amount due, and asked a waiver of the forfeiture. He says he tendered $400 to Mr. McDonald

whilst the ejectment cause was pending; that tender served no purpose in that case, it was not kept good by a payment into court, it was waived by the continuance of the contest at law, in which he denied that any rent was in arrears, and it was not sufficient, because it was made in 1862, and did not include the rent which accrued from the 1st May, 1860, to 1st May, 1862. So no tender sufficient for any purpose was made before the bill was filed.

The bill states (p 11) that $400 was paid into court when it was filed in 1865. What purpose did that serve? None whatever. The bill states that it was to pay the $110.48 claimed to be due under one of the leases, and $220.96, claimed upon the other lease, and interest and costs. I will not examine whether the sum was sufficient for such purpose, because it is wholly insufficient upon the case made in the bill. The verdict and judgment in the ejectment settled the question that the leases were in force, and that for the six months from 1st November, 1859, to 1st May, 1860, there was on the last date due and unpaid said sums of $110 48 and $220.96, for these were the sums demanded by the appellees, and if the demand had not been for the right sum there could be no forfeiture or recovery. Taylor's Landlord and Tenant, 359.

The verdict and judgment then settles the question that there was no legal defence to that claim for that six months.

The bill was filed in 1865; rent had accrued from 1st May, 1860, till that time, a period of five years. The rent under one lease of four powers was $600, and under the other lease of two powers, $300 each year, making the aggregate $3,000 and $1,500. That should have been tendered and paid into court, upon the principle that if he seeks equity he must do equity by complying with the entire claim justly against him, and upon the further doctrine that he asks the court to regard the forfeiture clause not as penalty, but as a security for the rent. So regarding it, the court will require that it

shall secure the rent up to the time of the filing of the bill for otherwise during the period from the demand in May and June, 1860, till the filing of the bill, that security is taken away from the appellees by the wrongful act of appellant. Atkins vs. Chilson, 11 Metcalf, (Mass.,) 114.

It surely cannot be questioned that the payment into court must cover the rent demanded in May, 1860, and also subsequently accruing rents. The appellant does not seem to question that, and therefore undertakes to excuse the want of such tender. He first sets up a partial failure to supply water prior to the time for which the demand was made and the judgment of forfeiture rendered, (pp. 5 and 6.) Can he sustain that claim? Such defence, whether legal or equitable, existed at the trial of the ejectment. The judgment in that case was conclusive of all matters involved in the case. It was conclusive that the leases existed, that the sums demanded for rent were due and unpaid, and that the demands were properly made. Miles vs. Caldwell, 2 Wallace, 35; Blanchard vs. Brian, 3 Wallace, 245.

I go further, and claim that the judgment is conclusive upon every defence that might properly have been made to the ejectment case, and any set-off, counter claim, or recoupment that could have been interposed to that claim of rent, was by this judgment forever settled, unless the party was prevented interposing the defence without neglect or fault on his part.

"Whenever a matter is finally determined by a competent tribunal, it is considered at rest forever."

* * * "This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated in the case.

Fischli vs. Fischli, 1 Blackford, 360—near top—on page 361—refers to 5 Bac., 439.

Hamer vs. Fish et al., 1 Pick., 435—particularly p. 439.

Le Guena Gouverneur et al., 1 Johns' cases, 436, *Arguendo,*

Radcliff J. says, (p. 492): "The general principle that the judgment or decree of a court possessing competent jurisdiction shall be final as to the subject matter thereby determined, is conceded on both sides, and can admit of no doubt. The principle, however, extends further. It is not only final, as to the matter actually determined, but as to every other matter which the parties might litigate in the cause, (see 1 Blackford, 360,) and which they might have decided."
and per Kent J, on p. 502: "Every person is bound to take care of his own rights, and to vindicate them in due season and in proper order."

This is a sound and salutary principle of law. Accordingly, if a defendant, having the means of defence in his power, neglects to use them, and suffers a recovery to be had against him by a competent tribunal, he is forever precluded. The only cases, which I can recollect as forming exceptions to this general rule, are—

1. The case of mutual dealings between the parties, where the defendant suits to set off his counter demand, and may still recover in a cross action; and

2. The case of ejectment, in which the defendant, neglecting to bring forward his title, is not precluded by the recovery against him from availing himself of it in a new suit."

A set-off or counter claim might remain as the ground of an action for the recovery of the money, but could not be waived by the party in the suit at law, and afterwards used in equity to restrain the execution of the judgment at law. To allow that would be to disregard all authority.

Then it is submitted that all legal defences existing at the time of the ejectment, against the claim of rent must have been interposed, and all equitable defences must have been enforced in a bill then filed to restrain the ejectment.

If, however, the defences against the rent claimed were equitable, then the appellee should at once have brought

his case in chancery to stay further proceedings until his equities were first ascertained and allowed. If he allowed the case to go into judgment, he has waived his equities—he is then too late.

Had the accounts been so complicated between the parties that they could not safely be tried at law, then the appellant might have brought his bill, but that must have been done whilst the case was pending at law. The proceeding then would have been in aid of the law court, and not to defeat its judgment.

2 Schoales and Lefraos R., 400. See p. 410.

A claim for failure to supply the water, and for damages, is peculiarly for a jury, and is not a case for accounting in chancery. Why did appellant not pay into court the rents which accrued after the demand in May, 1860?

Appellant claims that appellees partially failed to supply water, but the entire claim for deduction in the five years is about $1,350, (p. 6,) whilst the rent for that period was $4,500, leaving unpaid above $3,000. Why does he not tender that sum, or propose to pay it? To that he interposes speculative damages in loss of profits in use of his mill. (pp. 6–7.) Such damages could not be allowed in an action upon a covenant to keep in repair. But in the leases under consideration there is no covenant to repair, or maintain the supply of water. This question is squarely settled in the Trustees of the Wabash and Erie Canal vs. Brett *et al.* 25 Ind., 409. It is submitted that that decision leaves no question in this case—that the demurrer to the bill was properly sustained.

T. A. HENDRICKS,
A. G. PORTER,
For Appellees.